

ARKANSAS PRACTICE SERIES

MODEL JURY INSTRUCTIONS—CIVIL

2023 Edition

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Prepared by the
Arkansas Supreme Court, Committee on Model Jury
Instructions—Civil
Jamie Huffman Jones, Chair



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What's New in the 2023 Edition

New material in the 2023 Edition of Arkansas Practice Series, Model Jury Instructions—Civil includes:

- Updates to AMI 2900-- Claim for Damages Based on Deceptive Trade Practices (revised instruction and revised comment)

This order will become effective February 1, 1986.

**PER CURIAM ORDER OF SUPREME
COURT OF ARKANSAS
APRIL 19, 1965**

If Arkansas Model Jury Instructions (AMI) contains an instruction applicable in a civil case, and the trial judge determines that the jury should be instructed on the subject, the AMI instructions shall be used unless the trial judge finds that it does not accurately state the law. In that event he will state his reasons for refusing the AMI instructions. Whenever AMI does not contain an instruction on a subject upon which the trial judge determines that the jury should be instructed, or when an AMI instruction cannot be modified to submit the issue, the instruction on that subject should be simple, brief, impartial and free from argument.

This order will become effective February 1, 1966.

If counsel offers an instruction in lieu of an AMI instruction and the offer is refused, preservation of the record on appeal requires counsel to specify the reasons why the AMI instruction is inadequate or inaccurate. *Vanguard v. Paulk*, 244 Ark. 633, 435 S.W.2d 821 (1963). If an applicable AMI instruction is not used, the per curiam order also requires that the trial judge state the basis for his refusal. *Gartin v. Cooper Tire & Rubber Co.*, 252 Ark. 839, 481 S.W.2d 333 (1972); *Chicago, R. I. & P. R. Co. v. Hughes*, 250 Ark. 526, 457 S.W.2d 150 (1971).

An AMI instruction that accurately states the law should not be embellished, even if the addition accurately states the law. *McClard v. Crain Mgmt. Group, Inc.*, 313 Ark. 472, 855 S.W.2d 929 (1993).

It is not an abuse of discretion for a trial court to refuse an incomplete AMI instruction that omits a key issue and to give instead a non-AMI instruction that accurately states the applicable law. *Patterson v. United Parcel Service, Inc.*, 102 Ark. App. 378, 285 S.W.3d 683 (2008).

ANNOTATIONS TO PER CURIAM ORDER OF APRIL 19, 1965

The need to observe the per curiam order dated April 19, 1965 was emphasized in *Southeast Constr. Co. v. Eudy*, 252 Ark. 649, 480 S.W.2d 571 (1972); *Adkins v. Kelley's Grill*, 244 Ark. 199, 424 S.W.2d 373 (1968); and *Reed v. McGibboney*, 243 Ark. 789, 422 S.W.2d 115 (1967).

AMI instructions are to be used as a rule, and non-AMI instructions should only be used when an AMI instruction does not exist or cannot be modified. *Allstate Ins. Co. v. Dodson*, 2011 Ark. 19, at 6. When instructions are requested that do not conform to the AMI, they should be given only when the trial judge finds that the AMI instructions do not contain an essential instruction or do not accurately state the law applicable to the case. *Id.* at 5-6; *Nelson v. Stubblefield*, 2009 Ark. 256, 308 S.W.3d 586. Even if a non-AMI instruction correctly states the law, it is not error to refuse it when an AMI instruction covering the same subject matter is available. *Wharton v. Bray*, 250 Ark. 127, 464 S.W.2d 554 (1971).

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The Supreme Court alone has the power to adopt or to amend model jury instructions. *Rood v. State*, 4 Ark. App. 289, 630 S.W.2d 543 (1982).

ANNOTATIONS TO PER CURIAM ORDER OF APRIL 19, 1985

The need to observe the per curiam order dated April 19, 1985 was emphasized in *Southeast Constr. Co. v. Eudy*, 262 Ark. 649, 480 S.W.2d 571 (1972); *Adkins v. Kelley's Grill*, 244 Ark. 199, 434 S.W.2d 373 (1968); and *Reed v. McGiboney*, 243 Ark. 789, 432 S.W.2d 115 (1967).

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Table of Contents

USE OF AMI

INTRODUCTORY COMMENTS

CHAPTER 1 INTRODUCTORY INSTRUCTIONS

AMI 101	Cautionary Instructions
AMI 102	Cautionary Instructions—Reminder of Jurors' Duties During Recess
AMI 103	Respective Duties of Judge and Jury—Cautionary Instructions
AMI 104	Jury—Personal Observations and Experiences
AMI 105	Credibility of Witnesses
AMI 106	Effect of Intentional Destruction or Suppression of Evidence
AMI 106A	Adverse Inference
AMI 107	Expert Witnesses
AMI 108	Circumstantial Evidence
AMI 109	Two or More Claimants—Rights Are Separate
AMI 110	Two or More Defendants—Rights Are Separate
AMI 111	Interpreters

CHAPTER 2 ISSUES AND BURDEN OF PROOF

AMI 201	Issues—Case Submitted on Interrogatories
AMI 202	Meaning of Burden of Proof and Preponderance of the Evidence
AMI 203	Issues—Claim for Damages Based on Negligence—Burden of Proof
AMI 204	Issues—Complaint and Counterclaim Based on Negligence or Fault—Burden of Proof
AMI 205	Issues—Multiple Claims—Varying Standards of Care— Burden of Proof
AMI 206	Issues—Affirmative Defenses—Burden of Proof
AMI 207	Issues—Imputed Conduct—Burden of Proof
AMI 208	Issues—Imputed Conduct—Relationship Admitted
AMI 209	Issues—Agent or Independent Contractor—Burden of Proof

ARKANSAS MODEL JURY INSTRUCTIONS-CIVIL

- AMI 210 Admitted Liability
- AMI 211 Issues—Fraudulent Concealment to Suspend the Running of the Statute of Limitations
- AMI 212 Duration of Suspension of Running of Statute of Limitations

CHAPTER 3 NEGLIGENCE, FAULT, AND ORDINARY CARE

- AMI 301 Fault—Definition
- AMI 302 Negligence—Definition
- AMI 303 Ordinary Care—Definition
- AMI 304 Ordinary Care of a Minor
- AMI 305 Duty to Use Ordinary Care
- AMI 306 Definition of Assumption of Risk
- AMI 307 Issues—Nonparty Fault
- AMI 307A Illustrative Interrogatories—Multiple Defendants—Nonparties Involved

CHAPTER 4 INTENTIONAL TORTS AND DEFAMATION

- AMI 401 Issues—Tort of Outrage—Burden of Proof
- AMI 402 Issues—Claim for Damages Based Upon Deceit—Burden of Proof
- AMI 403 Issues—Interference with Contractual Relationship or Business Expectancy—Burden of Proof
- AMI 404 Interference with Contractual Relationship or Business Expectancy—Definition—Impropriety
- AMI 405 Reserved
- AMI 406 Reserved
- AMI 407 Issues—Claim for Damages Based Upon Defamation—Private Figure
- AMI 408 Issues—Claim for Damages Based Upon Defamation—Public Figure
- AMI 409 Issues—Claim for Damages Based Upon Defamation—Private Figure—Qualified Privilege
- AMI 410 Issues—Claim for Damages Based Upon Defamation—Private Figure—Report of Official Proceeding or Public Meeting
- AMI 411 Definition of Defamatory
- AMI 412 Definition of Published and Publication
- AMI 413 Issues—Claim for Damages Based Upon Malicious Prosecution—Burden of Proof
- AMI 414 Definition—Probable Cause

TABLE OF CONTENTS

AMI 415	Defense—Malicious Prosecution—Acting Upon the Advice of Counsel
AMI 416	Issues—Claim for Damages Based Upon Abuse of Process—Burden of Proof
AMI 417	Issues—Claim for Damages Based Upon Assault—Burden of Proof
AMI 418	Issues—Claim for Damages Based Upon Battery—Burden of Proof
AMI 419	Issues—Claim for Actual Damages Based Upon Intentional Tort—Burden of Proof
AMI 420	Issues—Claim for Damages Based Upon Invasion of Privacy by Intrusion Upon Seclusion
AMI 421	Issues—Claim for Damages Based Upon Invasion of Privacy by Appropriation
AMI 422	Issues—Claim for Damages Based Upon Invasion of Privacy by Public Disclosure of Private Facts
AMI 423	Issues—Claim for Damages Based Upon False Light Invasion of Privacy
AMI 424	Defense—Invasion of Privacy—Consent
AMI 425	Issues—Claim for Damages Based Upon Conversion of Personal Property

CHAPTER 5 PROXIMATE CAUSE

AMI 501	Proximate Cause—Concurring Proximate Cause—Definition
AMI 502	Concurring Proximate Causes—Liability—General Verdict
AMI 503	Intervening Proximate Cause—Definition and Effect—Burden of Proof

CHAPTER 6 SPECIFIC FACTORS AFFECTING NEGLIGENCE AND DEFENSES

AMI 601	Violation of Statute, Ordinance, or Regulation as Evidence of Negligence
AMI 602	Right to Assume Others Will Use Ordinary Care and Obey the Law
AMI 603	No Presumption of Fault from Happening of Injury
AMI 604	Duty to Anticipate Behavior of Children
AMI 605	Responsibility to Control Minor Children
AMI 606	Intoxication—Definition
AMI 607	Intoxication as Negligence
AMI 608	Negligent Entrustment
AMI 609	Res Ipsa Loquitur

ARKANSAS MODEL JURY INSTRUCTIONS-CIVIL

- AMI 610 Res Ipsa Loquitur in Addition to Specified Acts of Negligence
- AMI 611 Act of God
- AMI 612 Attempted Rescue—Negligence

CHAPTER 7 AGENCY—EMPLOYMENT—PARTNERSHIP— JOINT ENTERPRISE—IMPUTED LIABILITY

- AMI 701 Agent—Employee—Definition
- AMI 702 Scope of Authority—Scope of Employment—Definition
- AMI 703 Scope of Employment—Employee Driving Employer's Vehicle
- AMI 704 Agency—Employment—Deviation from Route
- AMI 705 Agency—Owner a Passenger in Vehicle
- AMI 706 Agency—Minor Driver's Parent a Passenger
- AMI 707 Agent or Independent Contractor
- AMI 707A Borrowed Servant
- AMI 708 Inherently Dangerous Work—Imputed Conduct—Independent Contractor
- AMI 709 Liability of Employer for Employment of Incompetent Independent Contractor
- AMI 709A Issues—Liability of Employer for Negligent Hiring, Supervision, or Retention of Employee
- AMI 710 Partnership—Definition
- AMI 711 Partnership—Tests of Existence of Relationship
- AMI 712 Joint Enterprise—Definition and Effect
- AMI 713 Issues—Acting in Concert
- AMI 714 Issues—Civil Conspiracy

CHAPTER 8 VICARIOUS LIABILITY FOR ACTS OF MINORS

- AMI 801 Willful or Malicious Destruction of Property by Minor
- AMI 802 Automobiles—Permitting Minor Under 14 to Drive
- AMI 803 Automobiles—Responsibility of Person Signing Application of Child for Operator's License
- AMI 804 Automobiles—Permitting Minor Under 18 to Drive—Failure to Sign License Application

CHAPTER 9 RULES OF THE ROAD

- AMI 901 Common Law Rules of Road—Lookout—Control—Speed

TABLE OF CONTENTS

AMI 902	Superior Right of Forward Vehicle
AMI 903	Violation of Statute or Ordinance as Evidence of Negligence
AMI 904	Right of Way—Uncontrolled Intersection
AMI 905	Right of Way—Stop Intersection
AMI 906	Right of Way—Four-Way Stop Intersection
AMI 907	Right of Way—Signal Light Intersection
AMI 908	Right of Way—Yield Intersection
AMI 909	Right of Way—Definition—Acquisition—Use
AMI 910	Operating Unsafe Vehicle
AMI 911	Pedestrians and Motorists—Common Right to Use the Streets and Highways
AMI 912	Passenger—Duty to Use Ordinary Care
AMI 913	Emergency Vehicles—Special Privileges
AMI 914	Emergency Vehicles—Duty of Drivers of Other Vehicles

CHAPTER 10 PRODUCTS LIABILITY

AMI 1001	Products Liability—Negligence—Duty of Manufacturer—General
AMI 1002	Products Liability—Negligence—Manufacturer's Duty to Warn
AMI 1003	Products Liability—Negligence—Manufacturer's Duty to Instruct
AMI 1004	Products Liability—Negligence—Vendor Assuming Role of Manufacturer
AMI 1005	Products Liability—Negligence—Vendor's Duty to Warn
AMI 1006	Products Liability—Negligence—Vendor's Duty to Inspect
AMI 1007	Products Liability—Negligence—Duty of Vendor of Food
AMI 1008	Products Liability—Issues—Strict Liability in Tort—Burden of Proof
AMI 1009	Products Liability—Issues—Defenses—Unavoidably Unsafe Products
AMI 1010	Products Liability—Issues—Breach of Implied Warranty of Merchantability—Burden of Proof
AMI 1011	Products Liability—Issues—Breach of Implied Warranty of Fitness for Particular Purpose
AMI 1012	Products Liability—Issues—Breach of Express Warranty
AMI 1013	Products Liability—Issues—Claims Involving Two or More Theories of Liability
AMI 1014	Products Liability—Issues—Comparative Fault—Evidence
AMI 1015	Products Liability—Issues—Compliance with Law
AMI 1016	Definition and Inference—Defective Condition
AMI 1017	Definition—Unreasonably Dangerous

CHAPTER 11 OWNERS AND OCCUPIERS OF LAND

AMI 1101	Willful or Wanton Conduct—Definition
----------	--------------------------------------

ARKANSAS MODEL JURY INSTRUCTIONS-CIVIL

- AMI 1102 Duty Owed to Trespasser
- AMI 1103 Duty Owed to Licensee
- AMI 1104 Duty Owed to Invitee
- AMI 1105 Landlord's Duty of Care to Repair and Maintain Property
- AMI 1106 Duty Owed to Admitted Invitee—Foreign Object or Substance
- AMI 1107 Distinction Between a Trespasser or Licensee and an Invitee—Duty Owed to Each
- AMI 1108 Absolute Liability—Ultrahazardous Activities
- AMI 1109 Issues—Attractive Nuisance—Burden of Proof
- AMI 1110 Duty Owed by Owner or Occupier of Land—Injuries or Damages Off Premises

CHAPTER 12 CONSTRUCTION

- AMI 1201 Duty of Care—Traveler with Knowledge of Construction Activity
- AMI 1202 Highway Contractor—Duty to Maintain Safe Passage
- AMI 1203 Contractor—Standard of Care
- AMI 1204 Architect, Engineer—Standard of Care
- AMI 1205 Issues—Breach of Implied Warranty of Habitability, Sound Workmanship, and Proper Construction in the Sale of a House
- AMI 1206 Extension of Implied Warranties to a Subsequent Purchaser of a House
- AMI 1207 Defense—Exclusion or Waiver of Implied Warranties of Habitability, Sound Workmanship, and Proper Construction
- AMI 1208 Definition—Habitability

CHAPTER 13 EXPLOSIVES

- AMI 1301 Negligence—Use of Explosives

CHAPTER 14 ELECTRICITY

- AMI 1401 Electricity—Duties in Installation, Inspection, and Repair
- AMI 1402 Electricity—Duty to Insulate or Isolate Electric Wires
- AMI 1403 Duty to Comply with National Electrical Safety Code
- AMI 1404 Duty to Warn of Danger
- AMI 1405 Electricity—Res Ipsa Loquitur

TABLE OF CONTENTS

CHAPTER 15 MALPRACTICE AND BREACH OF FIDUCIARY DUTY

- AMI 1501 Duty of Physician, Surgeon, Dentist or Other Medical Care Provider
- AMI 1502 Duty of Referring Physician, Surgeon, or Dentist
- AMI 1503 Imputed Conduct
- AMI 1504 Duty of Hospital, Sanitarium, or Nursing Home
- AMI 1505 Duty to Prevent Spread of Contagious Disease
- AMI 1506 Issues—Claim for Damages Based on Medical Injury—Informed Consent—Burden of Proof
- AMI 1507 Issues—Claim for Damages Based on Informed Consent—Negligence—Burden of Proof
- AMI 1508 Duty to Obtain Informed Consent
- AMI 1509 Proximate Cause—Informed Consent
- AMI 1510 Duty of Attorney—Negligence
- AMI 1511 Factors—Proximate Cause—Attorney Negligence
- AMI 1512 Issues—Claim for Damages Based Upon Breach of Fiduciary Duty
- AMI 1513 Fiduciary Duty—Definition—Relationship Undisputed

CHAPTER 16 ANIMALS

- AMI 1601 Animals—Duty of Owner or Custodian
- AMI 1602 Liability for Dangerous Animals
- AMI 1603 Liability for Dangerous Animals—Defenses
- AMI 1604 Liability for Dangerous Animals—Comparative Fault

CHAPTER 17 COMMON CARRIERS

- AMI 1701 Duty of Common Carrier to Passenger
- AMI 1702 Duty of Common Carrier to Protect Passengers from Other Passengers and Third Persons

CHAPTER 18 RAILROADS

- AMI 1801 Railroads—Duty to Sound Bell or Whistle for Crossing
- AMI 1802 Duty of Railroad to Keep Lookout
- AMI 1803 Speed of Train
- AMI 1804 Railroads—Grade Crossings—Duty of Motorist to Look and Listen

ARKANSAS MODEL JURY INSTRUCTIONS-CIVIL

- AMI 1805 Railroads—Abnormally Dangerous Crossing—Definition—
Duty to Warn

CHAPTER 19 DRAM SHOP

- AMI 1901 Dramshop Liability—Sale to a Minor
AMI 1902 Dramshop Liability—Sale to an Intoxicated Person

CHAPTER 20 EMINENT DOMAIN

- AMI 2001 Nature of Action—Burden of Proof
AMI 2002 Damages—Partial Taking by Sovereign
AMI 2003 Damages—Partial Taking by Entity Other than Sovereign
AMI 2004 Damages—Taking of Easement by Entity Other than
Sovereign
AMI 2005 Damages—Complete Taking
AMI 2006 Definition—Fair Market Value
AMI 2007 Definition—Highest and Best Use
AMI 2008 Fair Market Value—Factors to Consider
AMI 2009 Fair Market Value—Owner's Testimony
AMI 2010 Damages—Temporary Construction Easement
AMI 2011 Evidence of Sales and Leases of Comparable Properties
AMI 2012 Evidence as to Purchase Price of Property Taken

CHAPTER 21 COMPARATIVE FAULT—GENERAL VERDICT

- AMI 2101 Comparative Negligence or Fault—Claim by One
Plaintiff—No Counterclaim
AMI 2102 Comparative Negligence or Fault—Plaintiff Suing in
Representative Capacity
AMI 2103 Comparative Negligence or Fault—Complaint and
Counterclaim—One Plaintiff and One Defendant
AMI 2104 Comparative Negligence or Fault—Complaint Against
Principal and Agent—Counterclaim by Principal Only
AMI 2105 Comparative Negligence or Fault—Complaint Against
Principal and Agent—Counterclaim by Both Defendants
AMI 2106 Comparative Negligence or Fault—Complaint of Principal
and Agent—Counterclaim by Defendant
AMI 2107 Comparative Negligence or Fault—Complaint and
Counterclaim—Complaint of Principal and Agent—
Counterclaim by Principal and Agent

TABLE OF CONTENTS

- AMI 2108 Comparative Negligence or Fault—Multiple Claims—No
Imputed Negligence—No Joint Tortfeasors
- AMI 2109 Comparative Negligence or Fault—Multiple Claims—
Imputed Negligence
- AMI 2110 Comparative Negligence or Fault—Multiple Claims—Joint
Tortfeasors—No Imputed Negligence

CHAPTER 22 DAMAGES

- AMI 2201 Measure of Damages—General Instruction
- AMI 2202 Measure of Damages—The Nature, Extent, Duration,
and Permanency of the Injury
- AMI 2203 Measure of Damages—Aggravation of Pre-existing
Condition
- AMI 2204 Measure of Damages—Medical Expense—Past and
Future
- AMI 2205 Measure of Damages—Pain, Suffering, and Mental
Anguish—Past and Future
- AMI 2206 Measure of Damages—Loss of Earnings or Profits—Past
and Future
- AMI 2207 Measure of Damages—Loss of Earning Capacity
- AMI 2208 Measure of Damages—Scars, Disfigurement, and Visible
Results of Injury
- AMI 2209 Measure of Damages—Caretaking Expense—Past and
Future
- AMI 2210 Measure of Damages—Damage to Vehicle
- AMI 2211 Measure of Damages—Loss of Consortium
- AMI 2212 Measure of Damages—Parent's Cause of Action—Injury
to Child
- AMI 2213 Measure of Damages—Minor Plaintiff's Cause of Action
- AMI 2214 Mitigation of Damages—Personal Injuries
- AMI 2215 Measure of Damages—Collateral Sources
- AMI 2216 Measure of Damages—Wrongful Death—Cause of Action
- AMI 2217 Measure of Damages—Wrongful Death—Unmarried
Minor
- AMI 2218 Punitive Damages
- AMI 2218A Punitive Damages—Out-of-State Conduct and Harm to
Non-parties—Cautionary Instructions
- AMI 2219 Purpose of Mortality Tables
- AMI 2220 Present Value—Definition
- AMI 2221 Fair Market Value—Definition
- AMI 2222 Measure of Damages—Damage to Property—General
Instruction
- AMI 2223 Measure of Damages—Damage to Real
Property—Permanent
- AMI 2224 Measure of Damages—Damage to Real Property—
Temporary or repairable

ARKANSAS MODEL JURY INSTRUCTIONS-CIVIL

- AMI 2225 Measure of Damages—Damage to Real Property—
Destruction of Improvements
- AMI 2226 Measure of Damages—Damage to Crops
- AMI 2226A Measure of Damages—Damage to Trees or Growing
Timber
- AMI 2227 Measure of Damages—Damage to Personal Property
- AMI 2228 Measure of Damages—Damage to Personal Property—No
Salvage
- AMI 2229 Measure of Damages—Damage to Personal Property—
Clothing or Personal Effects
- AMI 2230 Mitigation of Damages—Real and Personal Property
- AMI 2231 Measure of Damages—Malicious Prosecution

CHAPTER 23 INSURANCE

- AMI 2301 Issues—Claim for Uninsured Motorist Coverage—Burden
of Proof
- AMI 2302 Issues—Claim for Uninsured Motorist Coverage—
Affirmative Defense—Burden of Proof
- AMI 2303 Issues—Claim for Underinsured Motorist Coverage—
Burden of Proof
- AMI 2304 Issues—Tort of “Bad Faith” by Insurance Company—
Burden of Proof
- AMI 2305 Issues—Claim for Policy Limit Under Valued Policy Law—
Burden of Proof

CHAPTER 24 CONTRACTS

CONTRACT FORMATION

- AMI 2401 Issues—Breach of Contract
- AMI 2402 Issues—Contract Formation
- AMI 2403 No Dispute as to Existence of Contract
- AMI 2404 Contract Express or Implied
- AMI 2405 Definition—Offer and Acceptance
- AMI 2406 Definition—Consideration
- AMI 2407 Definition—Reasonably Certain
- AMI 2408 Duration of Offer
- AMI 2409 Counteroffer
- AMI 2410 Issues—Breach of Contract—Third Party Beneficiary
Status—Issue of Fact
- AMI 2411 Issues—Breach of Contract—Third Party Beneficiary
Status—Not an Issue of Fact

TABLE OF CONTENTS

CONTRACT INTERPRETATION

- AMI 2412 Contract Interpretation—General Rule—Ambiguity in Language
- AMI 2413 Contract Interpretation—Ordinary Meaning
- AMI 2414 Contract Interpretation—Words or Phrases of a Particular Trade or Occupation
- AMI 2415 Contract Interpretation—Course of Performance
- AMI 2416 Contract Interpretation—Course of Dealing
- AMI 2417 Contract Interpretation—Custom in the Trade
- AMI 2418 Contract Interpretation—Construction of Express Terms, Course of Dealing, and Custom in the Trade
- AMI 2419 Contract Interpretation—Language of the Contract Should Be Interpreted as a Whole
- AMI 2420 Contract Interpretation—Contract Composed of More Than One Document
- AMI 2421 Contract Interpretation—Specific and General Provisions
- AMI 2422 Contract Interpretation—Written or Typewritten Provisions Control Provisions of Preprinted Forms
- AMI 2423 Contract Interpretation—Time Not Expressed—Reasonable Time
- AMI 2424 Contract Interpretation—Construction Against One Who Drafted Contract

PERFORMANCE OR BREACH

- AMI 2425 Modification of Contract
- AMI 2426 Implied Covenant of Good Faith and Fair Dealing
- AMI 2427 Breach
- AMI 2428 Substantial Performance
- AMI 2429 Tender

DEFENSES

- AMI 2430 Defense—Cancellation
- AMI 2431 Defense—Accord and Satisfaction
- AMI 2432 Defense—Release
- AMI 2433 Defense—Fraud in Inducement
- AMI 2434 Defense—Undue Influence
- AMI 2435 Defense—Duress
- AMI 2436 Defense—Waiver—General Rule
- AMI 2437 Defense—Waiver of Breach by Acceptance of Benefits
- AMI 2438 Defense—Estoppel
- AMI 2439 Defense—Impossibility of Performance
- AMI 2440 Defense—Disabling Illness
- AMI 2441 Defense—Plaintiff's Prevention of Performance

ARKANSAS MODEL JURY INSTRUCTIONS-CIVIL

DAMAGES

- AMI 2442 Damages—General Rule
- AMI 2443 Damages—Consequential Damages—Tacit Agreement Rule

PROMISSORY ESTOPPEL

- AMI 2444 Issues—Promissory Estoppel

RESTITUTION

- AMI 2445 Issues—Unjust Enrichment—Restitution Implied in Fact

CHAPTER 25 UCC SALES CONTRACTS

- AMI 2501 Issues—UCC Sales Contract Formation
- AMI 2502 No Dispute as to Existence of Contract
- AMI 2503 Offer and Acceptance
- AMI 2504 Lapse of Offer
- AMI 2505 Additional Terms in Acceptance or Confirmation
- AMI 2506 Definition—Merchant
- AMI 2507 Issues—Breach of UCC Warranty
- AMI 2508 Express Warranties
- AMI 2509 Implied Warranty of Merchantability
- AMI 2510 Implied Warranty from Course of Dealing or Usage of Trade
- AMI 2511 Course of Dealing, Usage of Trade, Course of Performance
- AMI 2512 Implied Warranty of Title and Against Infringements
- AMI 2513 Implied Warranty of Fitness for a Particular Purpose
- AMI 2514 Defense—Exclusion or Modification of Implied Warranties
- AMI 2515 Buyer's Rights on Improper Delivery
- AMI 2516 Issues—Rejection of Goods
- AMI 2517 Acceptance of Goods
- AMI 2518 Issues—Revocation of Acceptance
- AMI 2519 Buyer's Damages for Non-Delivery, Rejection or Revocation
- AMI 2520 Buyer's Damages for Accepted Goods—Breach of Warranty
- AMI 2521 Buyer's Incidental Damages
- AMI 2522 Buyer's Consequential Damages
- AMI 2523 Seller's Remedies
- AMI 2524 Seller's Damages—Buyer's Non-Acceptance or Repudiation
- AMI 2525 Seller's Damages—Action for the Price

TABLE OF CONTENTS

- AMI 2526 Seller's Damages After Resale of Goods
- AMI 2527 Seller's Incidental Damages
- AMI 2528 Damages—Proof of Market Price
- AMI 2529 Limitation or Modification of Remedies for Breach of Warranty

CHAPTER 26 TRADE SECRETS

- AMI 2600 Issues—Claim for Damages Based Upon Trade Secret Misappropriation
- AMI 2601 Definition—Misappropriation
- AMI 2602 Definition—Trade Secret
- AMI 2603 Definition—Improper Means
- AMI 2604 Measure of Damages—Misappropriation of Trade Secrets

CHAPTER 27 SECURITIES FRAUD

- AMI 2700 Issues—Claim for Damages Based on Securities Fraud—Purchaser's Claim Against Seller
- AMI 2701 Issues—Claim for Damages Based on Securities Fraud—Seller's Claim Against Purchaser
- AMI 2702 Defenses—Securities Fraud
- AMI 2703 Definitions—Securities Fraud
- AMI 2704 Issues—Imputed Liability—Securities Fraud
- AMI 2705 Defense—Imputed Liability—Securities Fraud
- AMI 2706 Measure of Damages—Securities Fraud

CHAPTER 28 FRANCHISE PRACTICES ACT

- AMI 2800 Issues—Claim for Damages Based on Termination, Cancellation or Failure to Renew Franchise
- AMI 2801 Definition—Franchise
- AMI 2802 Definition—Good Cause
- AMI 2803 Definitions—Franchisor, Franchisee, Person
- AMI 2804 Definition—Good Faith
- AMI 2805 Issues—Claim for Damages Based on Unlawful Practices of Franchisors
- AMI 2806 Issues—Claim for Damages Based on Misleading and Fraudulent Schemes in Sale or Purchase of Franchise
- AMI 2807 Definitions—Sale, Transfer, or Assignment

ARKANSAS MODEL JURY INSTRUCTIONS-CIVIL

CHAPTER 29 DECEPTIVE TRADE PRACTICES

- AMI 2900 Issues—Claim for Damages Based on Deceptive Trade Practices
- AMI 2901 Definitions—Deceptive Trade Practices
- AMI 2902 Issues—Claim for Damages Based on Deception, Fraud, or False Pretense and Concealment, Suppression, or Omission of Material Facts in Sales Transaction
- AMI 2903 Issues—Imputed Liability—Deceptive Trade Practices

CHAPTER 30 BANK DEPOSITS AND COLLECTIONS

- AMI 3001 Issues—Claim for Damages Based on Bank's Improper Payment of Check(s)
- AMI 3002 Measure of Damages—Failure to Exercise Ordinary Care
- AMI 3003 Defense—Failure to Promptly Notify—Loss Allocation
- AMI 3004 UCC Definition—Ordinary Care
- AMI 3005 UCC Definition—Good Faith
- AMI 3006 Negligence Contributing to Forged Signature or Alteration of Instrument

CHAPTER 31 EMPLOYMENT

- AMI 3101 Issues—Arkansas's whistle-blower act
- AMI 3102 Definition—"adverse action"
- AMI 3103 Definition—"good faith"
- AMI 3104 Definition—"waste"
- AMI 3105 Defense
- AMI 3106 Damages
- AMI 3107 Issues—Wrongful termination—Handbook exception to at-will doctrine

CHAPTER 35 CLOSING INSTRUCTIONS

- AMI 3501 Closing Instructions
- AMI 3502 Closing Instructions—Additional Cautionary Instructions
- AMI 3503 Jury to Reach Agreement if Possible—Deadlocked Jury

CHAPTER 36 ILLUSTRATIVE SETS OF INSTRUCTIONS

- I Right-Angle Automobile Collision

TABLE OF CONTENTS

- II** **Multiparty Automobile Collision**
- III** **Medical Malpractice Case**
- IV** **Basic Contract Dispute**
- V** **First Party Insurance (MedPay Denial)**

Table of Laws and Rules

Table of Cases

Index

ARKANSAS MODEL JURY INSTRUCTIONS

Civil

USE OF AMI

INTRODUCTORY COMMENTS

The Arkansas Model Jury Instructions - Civil are one of the most useful tools of a trial lawyer and judge. They address the issues in many of the cases that are tried to juries, making the attorneys' and judge's job easier. They also reduce the chances of an error in jury instructions that could cause a jury verdict to be reversed on appeal.

Preservation of Error

The plaintiff in each case should always prepare and submit a set of proposed jury instructions covering all of the issues that the plaintiff contends should be submitted to the jury, as well as standard instructions. The defendant should be prepared to submit alternative instructions if the defendant disagrees with the instructions submitted by the plaintiff and additional jury instructions if the defendant believes that the plaintiff's set is incomplete. Each party should also submit proposed verdict forms with the proposed instructions. Trial courts will appreciate the parties attempting to formulate an agreed set of jury instructions and attempting to resolve disputes over jury instructions prior to the jury instruction conference.

Each party should be prepared to argue, on the record, in a timely manner and with specificity, any objections to instructions or verdict forms proposed by an opposing party. Practitioners are cautioned to be familiar with, and strictly follow, the steps necessary to preserve the right to appeal from any adverse ruling of the trial court based on jury instructions, beginning with Rule 51 of the Arkansas Rules of Civil Procedure. In *Agracat, Inc. v. AFS-NWA, LLC*, 2012 Ark. App. 372, at 4, the appellant objected to an instruction on the grounds that it

ARKANSAS MODEL JURY INSTRUCTIONS-CIVIL

“improperly stated what a fiduciary duty is or what obligations it imposes on the parties.” In ruling that this objection was not sufficiently specific to preserve the issue for appellate review, the court stated “an objection that merely asserts that an instruction is an incorrect statement of the law is general in nature and does not preserve the point for review.” *Agracat, Inc.*, 2012 Ark. App. 372, at 5. *See also* *Allstate Ins. Co. v. Dodson*, 2011 Ark. 19, at 4-10, 376 S.W.3d 414, 419-423 (holding, in a case in which counsel objected to an instruction and began to explain her reasoning but was interrupted by the trial court, that any error in the instruction given was not preserved for appeal because the basis for the required specific objection was not part of the record). However, where “an instruction is inherently erroneous, a general objection to it will suffice.” *Advocat, Inc. v. Sauer*, 353 Ark. 29, 65, 111 S.W.3d 346, 367 (2003). “An inherently erroneous instruction is one that could not be correct under any circumstance.” *Id.*

Each party should listen carefully to the instructions as they are read to the jury. In *Thy N. Tran v. Thi T. Vo*, 2017 Ark. App. 618, 535 S.W. 3d 295 (2017), a trial court ordered a new trial or remittitur after concluding that a model jury instruction was incomplete because the second page of the instruction was missing. The Arkansas Court of Appeals held that the trial court had abused its discretion and reversed. The Court of Appeals concluded that the appellee had waived any error associated with the instruction and noted that the appellee had not objected to the instruction when it was read to the jury.

When ruling on the jury instructions, the trial court should decide if the instruction is a correct statement of the law and if there is some basis in the evidence to support the instruction. *Millsap v. Williams*, 2014 Ark. 469, at 12, 449 S.W.3d 291, 298. The trial court should give the model instruction unless the instruction does not accurately state the law. (Per Curiam Order of April 19, 1965). The party requesting the instruction should proffer for the record any instruction not given by the trial court.

In addition, attorneys should consider whether to request the submission of claims or itemized damages on interrogatories, instead of a general verdict. In some instances, an issue will not be preserved for appeal unless claims or damages are submitted to the jury on interrogatories rather than a general verdict. *See* Comment to AMI 201.

Organization of AMI

The AMI address those state law issues that are commonly presented in jury trials but do not attempt to address issues which do not frequently arise. At times the applicable principles of law are not sufficiently developed to permit the formulation of a model instruction. The fact that there is no AMI on a particular issue does not imply that the jury should not be instructed on that issue. A special instruction tailored to the issue must be prepared by counsel.

USE OF AMI

The instructions are organized in the order in which the issues are usually presented, but courts and practitioners should not be constrained by this organization and should organize the instructions for particular cases in the manner that most clearly presents the issues to the jury. There is no need to instruct on issues that are admitted or stipulated.

Almost all cases will call for the “standard” jury instructions found at AMI 101, 102, 103, 104, 105, 202, and 3501 or 3502, and will also require a damages instruction, either AMI 2201 with appropriate elements inserted or the specific damages instruction applicable to the particular cause of action.

Any case where an expert witness testifies will require AMI 107. Any case where there is circumstantial evidence will require AMI 108. Cases involving multiple parties will require the use of AMI 109 or 110, or both, as appropriate. When more than one party is alleged to be at fault, the appropriate instructions in Chapter 21 should be used.

The appropriate instructions in Chapters 2, 5, 6 and 22 can be used in most cases where negligence is the issue. Some particular types of negligence claims have jury instructions tailored to those causes of action, which can be found in Chapters 3, 9-18 and 23. In any case where the violation of a statute, ordinance or regulation is alleged to be evidence of negligence, AMI 601, or its motor vehicle accident counterpart, 903, should be used. Chapter 4 covers intentional torts and defamation.

Contract cases call for instructions from Chapter 24, and cases under Article 2 of the UCC utilize instructions from Chapter 25. These chapters have their own damages instructions.

Instructions for use in claims based on other statutory causes of action can be found in Chapters 8, 19 and 26-31. Chapters 26, 27 and 30 have their own damages instructions.

Instructions for eminent domain cases are in Chapter 20.

Most instructions have Notes on Use that should be followed in deciding whether an instruction should be submitted. The Comments following the instructions are intended to provide guidance to the users of this publication but are not intended to be exhaustive discussions of the legal principles contained in the instructions.

Chapter 36 contains illustrative sets of instructions for some common cases that can be used as a starting point for attorneys preparing a set of instructions. However, it is recommended that users become familiar with all of the instructions contained in this publication in order to ensure that all appropriate instructions, and no inappropriate

ARKANSAS MODEL JURY INSTRUCTIONS-CIVIL

instructions, are submitted.

CHAPTER 1

INTRODUCTORY INSTRUCTIONS

Table of Instructions

AMI

- 101. Cautionary Instructions.
- 102. Cautionary Instruction—Reminder of Jurors' Duties During Recess.
- 103. Respective Duties of Judge and Jury—Cautionary Instructions.
- 104. Jury—Personal Observations and Experiences.
- 105. Credibility of Witnesses.
- 106. Effect of Intentional Destruction or Suppression of Evidence.
- 106A. Adverse Inference.
- 107. Expert Witnesses.
- 108. Circumstantial Evidence.
- 109. Two or More Claimants—Rights Are Separate.
- 110. Two or More Defendants—Rights Are Separate.
- 111. Interpreters.

AMI 101

CAUTIONARY INSTRUCTIONS

A fair trial depends on you, the jury. Therefore, you must understand how this trial will work.

Each side presents evidence and makes arguments. The plaintiff goes first, and then the defense. The attorneys will have a chance to give you their views about the evidence at trial. These are called "opening statements," and are not evidence. They are made only to help you understand the evidence and the applicable law.

The parties will then present evidence through testimony of witnesses, exhibits, or anything else that I allow you to consider. The introduction of the evidence is governed by the law. Matters that an attorney offers to present, but that I do not allow, are not evidence. An attorney's statement is not evidence. If an attorney's statement is not based on the evidence, you should disregard it. However, admissions of fact by an attorney are binding on the attorney's client.

An attorney might object to the introduction of some evidence. I will decide if the evidence may be admitted. You are to accept my decision without question, and you are not to assume what the evidence might have been. You are not to assume that anything I say or do during trial indicates my view on the merits of this case. Any testimony that I order stricken from the record shall not be considered by you.

Sometimes the attorneys need to speak with me at my desk about legal issues outside your hearing. We will try to be brief.

During the trial, I will give you instructions. It is my duty to inform you of the law applicable to the case. It is your duty to accept and follow all my instructions as a whole. You are only to apply the law that I instruct you on; do not consider any other rule of law with which you might be familiar.

After the parties present their evidence, the attorneys will give you final remarks, called "closing arguments." These are not evidence and only given to help you understand the evidence and the law.

After I give you the final instructions, you will go to the jury room together to discuss, or deliberate, about the case. Deliberations are private and no one

but the jurors will be in the room. Your decision is your verdict.

We will take breaks during the trial, called "recesses." Your duties as a juror continue during these recesses, even if you are away from the courtroom.

Following these rules ensures that the parties have a fair trial:

(1) Do not make up your mind during the trial about what the verdict should be but instead wait until each party has presented evidence and I have instructed you as to the law.

(2) You must not allow sympathy, prejudice, or like or dislike of any party or any attorney in this case to influence your decision.

(3) You are to decide the case based only on the evidence presented in this courtroom and the law as I instruct. You are not to consider any information from any other source.

(4) Do not communicate in any way to anyone about this case, or to anyone involved in this case, until the trial has ended. If someone tries to talk to you about the case, or about anyone involved in the case, please report it immediately.

(5) Do not communicate about this trial through an electronic device. Do not post any information about this trial on any electronic forum, including social media. (Social media may include but is not limited to Twitter, Facebook, Snapchat, Instagram, Reddit).

(6) You are to turn off your electronic devices

when you are in the courtroom and during your deliberations. While you are permitted to use them during recesses, you are not permitted to use them to for any matter related to this case.

(7) Do not research or look up anything or anyone about this case, whether in a book or an electronic device. Do not read or listen to news stories or articles about the case whether in print or on an electronic device, or the television, or the radio. Do not visit the places involved in this case.

(8) You should avoid all news sources, social media, news televisions, or other informational media until this trial is over. While there may not be anything related to this case, if there were you might inadvertently read or hear something.

(9) During the trial, you are not to talk to any of the parties, lawyers, or witnesses involved with this case even if to say hello or be courteous. If someone saw you speaking to someone involved with the case, it might make them think you are not fair or the other parties are not fair. When someone involved in the case does not speak to you, remember it is because they are not supposed to talk to you either.

Violations of these rules can have serious consequences, including that this case might have to be tried again at a costly and wasteful price. If you become aware of any violation of these rules at all, notify court personnel immediately.

NOTE ON USE

This instruction should be given immediately following the empanelling of the jury.

The Court may give its own examples in the parenthetical listed in Section 5 to remain relevant with the current social media trends.

COMMENT

These cautionary instructions explain in detail what the requirement that jurors consider only the evidence in court and the law as instructed means in an era of ubiquitous access to information technology. The Committee has received expressions of concern about the particular problem of juror access to information technology. The problem is widespread and well-documented. *See, e.g.,* John Schwartz, *As Jurors Turn to Web, Mistrials Are Popping Up*, N.Y. TIMES, Mar. 18, 2009, at A1 (noting examples, including case of Arkansas juror who posted Twitter messages about trial during jury service). *See generally*, Timothy J. Fallon, Note, *Mistrial in 140 Characters or Less? How the Internet and Social Networking Are Undermining the American Jury System and What Can be Done to Fix It*, 38 HOFSTRA L. REV. 935 (2010) (describing multiple examples, reviewing remedies, and advocating use of comprehensive pretrial instructions that specifically mention examples of the types of technology subject to misuse); Amanda McGee, Comment, *Juror Misconduct in the Twenty-First Century: The Prevalence of the Internet and Its Effect on American Courtrooms*, 30 LOY. L.A. ENT. L. REV. 301 (2010) (same); Laura Whitney Lee, Comment, *Silencing the “Twittering Juror”: The Need to Modernize Pattern Cautionary Jury Instructions to Reflect the Realities of the Electronic Age*, 60 DEPAUL L. REV. 181 (2010) (same); Ebony Nicolas, Note, *A Practical Framework for Preventing “Mistrial by Twitter,”* 28 CARDOZO ARTS & ENT. L.J. 385 (2010). For the federal response, *see* JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT, PROPOSED MODEL JURY INSTRUCTIONS: THE USE OF ELECTRONIC TECHNOLOGY TO CONDUCT RESEARCH ON OR COMMUNICATE ABOUT A CASE (Dec. 2009), *available at* <http://www.uscourts.gov/uscourts/News/2010/docs/DIR10-018-Attachment.pdf>. For sample federal cautionary instructions, *see* 1 KEVIN F. O'MALLEY, ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS, APPENDIX E (6th ed. 2006 & 2012 pocket part).

These instructions also explain to jurors the reason for the cautionary instructions. Because jurors are more likely to comply with what may seem to them substantial restrictions on otherwise normal behavior if they understand the purpose of those restrictions, the Committee believes it is preferable to explain to jurors the reason for the rules before giving them the rules themselves. For another example of an explanation, *see* COMMITTEE ON MODEL CIVIL JURY INSTRUCTIONS WITHIN THE EIGHTH CIRCUIT, *Preliminary Instructions for Use at Commencement of Trial*, in MANUAL OF MODEL CIVIL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT ch. 1 (2011).

The desirability of the portion of the instruction for jurors not to visit the scene is suggested by *Diemer v. Dischler*, 313 Ark. 154, 852 S.W.2d 793 (1993) (court did not instruct jurors not to visit accident

scene, which omission, along with additional factors, played a role in court denying motion for new trial based on jurors' investigation of the scene).

Research References

West's Key Number Digest
Trial ¶201, 217, 232(3)

Legal Encyclopedias
C.J.S., Trial §§ 633 to 636, 642 to 643, 677 to 680, 684

AMI 102

CAUTIONARY INSTRUCTIONS—REMINDER OF JURORS' DUTIES DURING RECESS

[We are about to take (our first) (a) recess. Remember that all of the rules I have given you apply even when you are away from the courthouse, such as at recess.

And remember the basic rule: *Do not communicate about this case and the places and persons involved by any means whatsoever with anyone at all, or look for or receive any information whatsoever about this case other than the evidence in this courtroom and the law as I have instructed you, until your jury duty is complete and I have discharged you.*

Remember why we have this basic rule: So that you keep an open mind throughout the trial, and appear to others to keep an open mind, and so that you decide the case based only on the evidence presented at trial before the parties, and based only on the law as the Court has instructed you.

Do not talk among yourselves about this case, or the people or places involved in it, until I send you to the jury room for your deliberations.

Do not talk with or otherwise communicate with any of the parties, lawyers, or witnesses involved in the case even to exchange pleasantries.

If you become aware of any violation of any of these rules at all, notify court personnel of the violation.]

[Remember what the basic rule means:

Do not communicate in any way (including through an electronic device) to anyone about this case, or to anyone about this case, or to anyone involved in this case, until the trial has ended.

Do not share information, or your thoughts, opinions, views, updates, or impressions about the case or the people or places involved with anyone else through any means. And do not allow anyone else to share with you any such information, thoughts, opinions, views, updates, or impressions.

Avoid all news sources, social media, news televisions, or other informational media until this case is over. Do not research or look up anything or anyone about this case, whether in a book or an electronic device. Do not read or listen to news stories or articles about the case whether in print or on an electronic device, or the television, or the radio. Do not visit the places involved in this case.

NOTE ON USE

The first bracketed portion of this instruction should be given before the first recess.

The second bracketed portion may be given at the court's discretion before any recess.

This instruction may be given at the court's discretion before subsequent recesses.

COMMENT

The second bracketed portion of this instruction repeats the cautions about extrajudicial communications, especially those concerning the use of electronic devices. This portion is provided in case the court, in its discretion, concludes that those points bear repetition.

Research References

West's Key Number Digest
Trial ¶¶ 201, 217, 232(3)

Legal Encyclopedias
C.J.S., Trial §§ 633 to 636, 642 to 643, 677 to 680, 684

AMI 103**RESPECTIVE DUTIES OF JUDGE AND JURY—
CAUTIONARY INSTRUCTIONS**

- (a) A fair trial depends on you, the jury.**
- (b) It is my duty as judge to inform you of the law applicable to this case by instructions, and it is your duty to accept and follow them as a whole, not singling out one instruction to the exclusion of others. You should not consider any rule of law with which you may be familiar.**
- (c) It is your duty to determine the facts from the evidence produced in this trial. You are to apply the law as contained in these instructions to the facts and render your verdict upon the evidence and law. You should not permit sympathy, prejudice, or like or dislike of any party to this action or of any attorney to influence your findings in this case.**
- (d) Many of us have biases about, or certain perceptions, or stereotypes of other people. We may be aware of some of our biases, but not fully aware of others. You must not let bias, prejudice, or public opinion influence your decision. You must not be biased in favor of or against any party or witness because of his or her disability, gender, race, religion, ethnicity, sexual orientation, age, national origin, or socioeconomic status.**
- (e) In deciding the issues you should consider the testimony of the witnesses and the exhibits received in evidence. The introduction of evidence in court is governed by law. You should accept without question my rulings as to the admissibility or rejection of evidence, drawing no**

inferences that by these rulings I have in any manner indicated my views on the merits of the case.

- (f) Opening statements, remarks during the trial, and closing arguments of the attorneys are not evidence but are made only to help you in understanding the evidence and applicable law. Any argument, statements, or remarks of attorneys having no basis in the evidence should be disregarded by you. [However, an admission of fact by an attorney is binding on *[his][or][her]* client.]
- (g) I have not intended by anything I have said or done, or by any questions that I may have asked, to intimate or suggest what you should find to be the facts, or that I believe or disbelieve any witness who testified. If anything that I have done or said has seemed to so indicate, you will disregard it.

NOTE ON USE

The last sentence in (f) should be given only when counsel's statements may be treated as an admission.

COMMENT

It is the better practice to give this instruction when requested or to recite into the record the reasons for not giving it in the exceptional cases when a refusal to give it is justified. *McDaniel Bros. Constr. Co. v. Mid-State Constr. Co.*, 252 Ark. 1223, 482 S.W.2d 825 (1972), citing *Smith v. Alexander*, 245 Ark. 567, 433 S.W.2d 157 (1968).

Allegedly improper remarks made by the court may be cured by this instruction. *Nobles v. Casebier*, 327 Ark. 440, 938 S.W.2d 849 (1997); *Rickett v. Hayes*, 256 Ark. 893, 511 S.W.2d 187 (1974).

Remarks by counsel during trial are not evidence. *Barnes v. Everett*, 351 Ark. 479, 95 S.W.3d 740 (2003); *Ark. State Highway Comm'n v. Liles*, 256 Ark. 715, 510 S.W.2d 275 (1974); *Ross v. Moore*, 30 Ark. App. 207, 785 S.W.2d 243 (1990).

Research References

West's Key Number Digest
 Trial ¶¶ 201, 217, 232(3)

Legal Encyclopedias
 C.J.S., Trial §§ 633 to 636, 642 to 643, 677 to 680, 684

AMI 104

**JURY—PERSONAL OBSERVATIONS AND
EXPERIENCES**

In considering the evidence in this case you are not required to set aside your common knowledge, but you have a right to consider all the evidence in the light of your own observations and experiences in the affairs of life.

NOTE ON USE

Do not use this instruction when the bracketed paragraph of AMI 1501 or 1512 is given.

COMMENT

The Notes on Use to AMI 1501 and 1512 have been modified to clarify the distinction between expert opinions on issues of professional negligence and matters that may be considered within common knowledge based on *Duke v. Lovell*, 262 Ark. 290, 556 S.W.2d 416 (1977).

In a medical malpractice case, when the second paragraph of AMI 1501 was not given, it was error not to give this instruction “for it assures the jury that they may use common sense in considering whether the defendant was negligent.” *Haney v. DeSandre*, 286 Ark. 258, 260, 692 S.W.2d 214, 215 (1985).

Arkansas cases have long acknowledged the role a juror’s common knowledge and experience play in determining the outcome of a trial. See *Rogers v. Stillman*, 223 Ark. 779, 781, 268 S.W.2d 614, 616 (1954) (jury’s “common sense and experience in the everyday affairs of life” could be used in determining extent of loss caused by cattle); *Kroger Grocery & Baking Co. v. Woods*, 205 Ark. 131, 167 S.W.2d 869 (1943) (it is within common knowledge of jury that mold is caused by dampness and that mold is unfit for consumption). But see *Taylor v. Riddell*, 320 Ark. 394, 896 S.W.2d 891 (1995) (within jury’s comprehension to consider a surgeon’s failure to sterilize instruments or to remove a sponge before closing an incision but expert testimony was required to aid the jury when considering a vesicovaginal fistula).

Research References

West’s Key Number Digest
Trial ¶254

Legal Encyclopedias
C.J.S., Trial §§ 806 to 808

AMI 105

CREDIBILITY OF WITNESSES

You are the sole judges of the weight of the evidence and the credibility of the witnesses. In determining the credibility of any witness and the weight to be given the witness's testimony, you may take into consideration the witness's demeanor while on the witness stand, any prejudice for or against a party, the witness's means of acquiring knowledge concerning any matter to which [he][or][she] testified, any interest the witness may have in the outcome of the case, and the consistency or inconsistency of the witness's testimony, as well as its reasonableness or unreasonableness.

COMMENT

It is a long-standing rule that credibility of witnesses and the weight to be given to the evidence are questions for the jury. *See Chicago, R. I. & P. R. Co. v. Mock*, 252 Ark. 44, 477 S.W.2d 465 (1972).

Research References

West's Key Number Digest

Trial ¶187, 210, 236, 252(21)

Legal Encyclopedias

C.J.S., Trial §§ 595 to 602, 674 to 679, 684, 765 to 767, 793, 795

AMI 106

EFFECT OF INTENTIONAL DESTRUCTION OR
SUPPRESSION OF EVIDENCE

If you find that a party intentionally *[destroyed]* *[or]* *[lost]* *[or]* *[suppressed]* _____ with knowledge that *[it]* *[its contents]* may be material to a *[pending]* *[potential]* claim, you may draw the inference that *[the (contents of the) (document) (writing) (photograph) (_____)]* *[an examination of it]* would have been unfavorable to that party's *[claim]* *[defense]*. When I use the term "material" I mean evidence that could be a substantial factor in evaluating the merit of a claim or defense in this case.

NOTE ON USE

This instruction should be used only when the party requesting the instruction can demonstrate the intentional destruction of material evidence.

COMMENT

This instruction was approved as a correct statement of the law in *Bunn Builders, Inc. v. Womack*, where the Arkansas Supreme Court held that while intentional destruction is a necessary predicate for giving the instruction, the trial court is not required to find the spoliator acted in bad faith or with the desire to suppress the truth. 2011 Ark. 231, at 10–11. The court in *Bunn Builders* rejected the Eighth Circuit Court of Appeals' requirement of "intentional destruction indicating a desire to suppress the truth." *Id.* (citing *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739 (8th Cir. 2004)). "Spoliation is defined as 'the intentional destruction of evidence and when it is established, [the] fact finder may draw [an] inference that [the] evidence destroyed was unfavorable to [the] party responsible for its spoliation.'" *Goff v. Harold Ives Trucking Co.*, 342 Ark. 143, 146, 27 S.W. 3d 387, 388 (2007) (quoting BLACK'S LAW DICTIONARY 1401 (6th ed. 1990)). In *Bedell v. Williams*, the Arkansas Supreme Court confirmed its holding in *Bunn Builders* but reversed the giving of this instruction because the trial court had not made a finding, and there was no evidence presented to suggest, that the documents in question had been destroyed. 2012 Ark. 75, at 20. The court stated that the facts that certain documents were required by

law to be kept, were in existence at one time, and were not produced because they could not be located, were alone insufficient to support the giving of this instruction. *Id.*

In *Tomlin v. Wal-Mart Stores, Inc.*, the trial court's refusal to give spoliation instruction was held proper where there was no proof that the defendant had destroyed the evidence in other than a routine manner or that it was intentionally destroyed. 81 Ark. App. 198, 209, 100 S.W.3d 57, 64 (2003); *Cantrell v. Toyota Motor Corp.*, 2018 Ark. App. 335, 553 S.W.3d 157. Likewise, in *Rodgers v. CWR Construction, Inc.*, the court held that "[i]n the absence of any intentional misconduct, . . . the trial court [did not] abuse[] its discretion by failing to give the jury an instruction on spoliation of evidence." 343 Ark. 126, 133, 33 S.W.3d 506, 511 (2000). *But see* *Superior Fed. Bank v. Mackey*, 84 Ark. App. 1, 129 S.W.3d 324 (2003) (holding there was sufficient evidence for the trial court's submission of a spoliation instruction where no credible explanation was given for absence of an approved contractor's list, personnel evaluations, and loan committee minutes).

The Arkansas Supreme Court has declined to recognize an independent tort of spoliation in both the first party and third party contexts. *Goff, supra* (first party); *Downen v. Redd*, 367 Ark. 551, 242 S.W.3d 273 (2006) (third party). However, the court in *Goff* observed that "an aggrieved party can request that a jury be instructed to draw a negative reference against the spoliator." 342 Ark. at 150, 27 S.W.3d at 391. *See also* *Union Pac. R.R. Co. v. Barber*, 356 Ark. 268, 303, 149 S.W.3d 325, 348 (2004) (where the railroad intentionally failed to preserve voice tapes and track inspection records, instruction was given to allow jury to infer that contents of the tapes and records would have been unfavorable to the railroad); *Carr v. St. Paul Fire & Marine Ins. Co.*, 384 F. Supp. 821, 831 (W.D. Ark. 1974) (recognizing that the jury had a right to infer that the record, had it been retained, would have been probative of negligence).

The adverse inference under the doctrine of spoliation has been drawn where a physician failed to dictate a post-surgical note, when required by standard medical procedure and public policy to do so. *Smith v. United States*, 128 F. Supp. 2d 1227, 1233–34 (E.D. Ark. 2000).

In *Middleton v. Middleton*, 188 Ark. 1022, 1026, 68 S.W.2d 1003, 1005–06 (1934), a case involving a destroyed holographic will, the Arkansas Supreme Court explained:

The general rule deduced from the maxim that all things are presumed against a wrongdoer is so natural and just that it has become a part of the law of every civilized land, and by it the presumption is all against the spoliator. Where some written instrument, which is a part of the material evidence in a case, has been destroyed, the presumption arises that if it had been produced it would have been against the interest of the spoliator, and where the instrument destroyed is of such nature

as to destroy all evidence, there follows a conclusive presumption that if produced it would have established the claim of the adversary of him who destroyed the instrument where it is shown that the destruction was willful.

Since the adverse inference is permissive, it is subject to reasonable rebuttal. *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739, 750 (8th Cir. 2004).

The Arkansas Supreme Court has also declined to apply the doctrine to so-called “secondary evidence” in a case in which there also was no indication that the defendant had deliberately destroyed the records for the purpose of interfering with the plaintiff’s case. *Gallup v. St. Louis, I.M. & S.R. Co.*, 140 Ark. 347, 215 S.W. 586 (1919).

An instruction on spoliation is designed to remedy litigation misconduct. As the court noted in *Goff*, the conduct described in this instruction may also: (i) be a criminal offense, *see* Ark. Code Ann. §§ 5-53-2110, 5-53-2111 (Repl. 1997); (ii) give rise to discovery sanctions, *see* Ark. R. Civ. P. 37(b)(2); (iii) constitute a factor in the award of punitive damages, *see Barber, supra*; and (iv) violate ethical standards, *see* Model Rules of Professional Conduct 3.4(a) and 8.4(c), (d).

Research References

West’s Key Number Digest
Trial ¶211, 234(8), 252(22)

Legal Encyclopedias
C.J.S., Trial §§ 591 to 594, 670, 684, 747, 757, 793, 795

AMI 106A

ADVERSE INFERENCE

Where relevant evidence is within the control of the party in whose interest it would naturally be to produce it, and that party fails to do so without satisfactory explanation, you may draw the inference that such evidence would have been unfavorable to that party.

NOTE ON USE

This instruction should be used only after the court has made a determination that the evidence is sufficient to support such an inference.

COMMENT

The elements that must be proven to make this instruction appropriate are: (1) identified relevant evidence, (2) in the possession of a party in whose interest it is to produce it, and (3) who fails to do so without satisfactory explanation. See *Source Logistics, Inc. v. Certain Underwriters at Lloyd's of London* Subscribing to Policy No. NA041790U, 2010 Ark. App. 239; *Slaughter v. Capitol Supply Co.*, 2009 Ark. 221, 306 S.W.3d 432.

An inference that documents would have been unfavorable was appropriate in *Volunteer Transport, Inc. v. House* where a witness relied upon his memory instead of producing available documents. 357 Ark. 95, 162 S.W.3d 456 (2004) (citing *Cox v. Farrell*, 292 Ark. 177, 728 S.W.2d 954 (1987), which approved a jury instruction with substantially similar language). The comparable federal model instruction includes as an additional factor that the evidence was reasonably available to the non-producing party and not to the adverse party. See O'MALLEY, GRENIG & LEE, *FEDERAL JURY PRACTICE AND INSTRUCTIONS* § 104.26 (5th ed. 2000). The Arkansas Supreme Court has not yet addressed that issue.

The failure of a party present at trial to testify supports giving this instruction. *Jones v. Brown*, 242 Ark. 537, 414 S.W.2d 618 (1967); *Saliba v. Saliba*, 178 Ark. 250, 11 S.W.2d 774 (1928). However, the failure to call a divorced spouse as a witness is not a sufficient basis for the instruction. *Henry v. Landreth*, 254 Ark. 483, 494 S.W.2d 114 (1973). There is no inference that the cross-examination of a witness under the control of a party would be unfavorable to that party where the witness is not present at the trial, is beyond the subpoena power of the court, and is not called to testify although the witness was deposed before

trial, and the deposition was introduced into evidence and read at the trial. *Slaughter, supra*.

This instruction should not be given when a party fails to call a retained expert. *Arkansas State Highway Comm'n v. Johnson*, 300 Ark. 454, 780 S.W.2d 326 (1989); *Arkansas State Highway Comm'n v. First Pyramid Life Ins. Co. of America*, 265 Ark. 417, 579 S.W.2d 587 (1979).

Research References

West's Key Number Digest

Trial \S 211, 234(8), 252(22)

Legal Encyclopedias

C.J.S., Trial $\S\S$ 591 to 594, 670, 684, 747, 757, 793, 795

AMI 107

EXPERT WITNESSES

An expert witness is a person who has special knowledge, skill, experience, training, or education on the subject to which *[his][or][her]* testimony relates.

An expert witness may give an opinion on questions in controversy. You may consider the expert's opinion in the light of *[his][or][her]* qualifications and credibility, the reasons given for the opinion, and the facts and other matters upon which the opinion is based.

You are not bound to accept an expert opinion as conclusive, but should give it whatever weight you think it should have. You may disregard any opinion testimony if you find it to be unreasonable.

NOTE ON USE

This instruction should be used only where testimony has been admitted under Ark. R. Evid. 702.

COMMENT

This instruction is identical to AMCI 2d 105. In *Redman v. St. Louis Southwestern Ry. Co.*, 316 Ark. 636, 873 S.W.2d 542 (1994), the court held that it was not error to give an instruction substantially similar to AMCI 2d 105 since, at that time, there was no AMI instruction concerning expert witnesses.

In *Gibson Appliance Co. v. Nationwide Ins. Co.*, 341 Ark. 536, 545, 20 S.W.3d 285, 291–92 (2000), the court stated that “juries are not bound to accept an expert opinion as conclusive, but should give it whatever weight they think it should have and may disregard any opinion testimony if they find it to be unreasonable.”

In *Dixon Ticonderoga Co. v. Winburn Tile Mfg. Co.*, 324 Ark. 266, 271, 920 S.W.2d 829, 832 (1996), the court stated that “a properly qualified expert’s opinion constitutes substantial evidence, unless it is shown that the expert’s opinion is without reasonable basis” (quoting *Ford Motor Co. v. Massey*, 313 Ark. 345, 349, 855 S.W.2d 897, 899 (1993)).

Research References

West's Key Number Digest

Trial ¶¶ 194(5), 235(7)

Legal Encyclopedias

C.J.S., Trial §§ 616, 623, 627, 684, 759, 764

AMI 108

CIRCUMSTANTIAL EVIDENCE

A fact in dispute may be proved by circumstantial evidence as well as by direct evidence. A fact is established by direct evidence when, for example, it is proved by witnesses who testify to what they saw, heard, or experienced. A fact is established by circumstantial evidence when its existence can reasonably be inferred from other facts proved in the case.

NOTE ON USE

This instruction should be used only in a case involving circumstantial evidence.

COMMENT

This instruction is a correct statement of the law. *Moore Ford Co. v. Smith*, 270 Ark. 340, 604 S.W.2d 943 (1980).

Early instructions regarding circumstantial evidence were approved in *Ford Motor Co. v. Fish*, 233 Ark. 634, 346 S.W.2d 469 (1961).

Research References

West's Key Number Digest
Trial ¶209, 235(4)

Legal Encyclopedias
C.J.S., Trial §§ 663, 684, 759, 762

AMI 109

**TWO OR MORE CLAIMANTS—RIGHTS ARE
SEPARATE**

The rights of _____, _____, and _____, are separate and distinct, and you will treat their claims as if they were separate suits. But, so far as the instructions and evidence apply to each, they govern *[his] [or][her]* case.

NOTE ON USE

This instruction should not be given when the fault of one plaintiff may be imputed to another, or when the rights of one plaintiff are derivative of another.

COMMENT

Inconsistent verdicts among plaintiffs were upheld in *Green v. West Memphis Lumber Co.*, 192 Ark. 1177, 91 S.W.2d 261 (1936) (passenger and driver plaintiffs), and *Coca-Cola Bottling Co. of Southwest Arkansas v. Strather*, 192 Ark. 999, 96 S.W.2d 14 (1936) (two plaintiffs drank from same soft drink bottle).

Each plaintiff is entitled to the benefit of evidence adduced on behalf of other parties. *Stutzenbaker v. Arkansas Power & Light Co.*, 187 Ark. 438, 59 S.W.2d 1037 (1933).

Research References

West's Key Number Digest
Trial ⇨203(1)

Legal Encyclopedias
C.J.S., Trial §§ 646 to 648, 650

AMI 110

**TWO OR MORE DEFENDANTS—RIGHTS ARE
SEPARATE**

Although there is more than one defendant in this action, it does not follow from that fact alone that if one is at fault, *[both]* *[all]* are at fault. Each is entitled to a fair consideration of *[his]**[or]**[her]* own defense and is not to be adversely affected by your findings with respect to the other(s). The instructions and the evidence govern the case as to each defendant, insofar as they are applicable to that defendant, to the same effect as if *[he]**[or]**[she]* were the only defendant in the action. You will decide each defendant's case separately as if each were a separate lawsuit.

NOTE ON USE

This instruction should not be given when the fault of one defendant may be imputed to another.

COMMENT

In *Beaumont v. Robinson*, 282 Ark. 181, 668 S.W.2d 514 (1984), the trial court properly instructed the jury that the plaintiffs' claims should be treated as separate suits and that each defendant's case was to be decided separately as if each were a separate suit. *See also* *Browne v. Dugan*, 189 Ark. 551, 74 S.W.2d 640 (1934) (trial court properly instructed the jury to consider evidence and instructions applicable to each defendant regardless of whether they found against or for any of the other defendants).

Research References

West's Key Number Digest
Trial ¶203(1)

Legal Encyclopedias
C.J.S., Trial §§ 646 to 648, 650

AMI 111

INTERPRETERS

Languages other than English *[will be used]* *[have been used]* during this trial.

The evidence you are to consider is only that provided through the official court interpreters. Although some of you may understand the non-English language used, it is important for all jurors to consider the same evidence. Therefore, you must base your decision on the evidence presented in the English interpretation. You must not rely in any way upon your own interpretation of the witness's words.

NOTE ON USE

This instruction should be given before the foreign language witness testifies or at the beginning of the trial and before the jury begins its deliberations.

COMMENT

This instruction is drawn from materials prepared by the National Center for State Courts. WILLIAM E. HEWITT, COURT INTERPRETATION: MODEL GUIDES FOR POLICY AND PRACTICE IN THE STATE COURTS 152 (1995), *available at* <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/accessfair/id/162>.

CHAPTER 2

ISSUES AND BURDEN OF PROOF

Table of Instructions

AMI

- 201. Issues—Case Submitted on Interrogatories.
- 202. Meaning of Burden of Proof and Preponderance of the Evidence.
- 203. Issues—Claim for Damages Based on Negligence—Burden of Proof.
- 204. Issues—Complaint and Counterclaim Based on Negligence or Fault—Burden of Proof.
- 205. Issues—Multiple Claims—Varying Standards of Care—Burden of Proof.
- 206. Issues—Affirmative Defenses—Burden of Proof.
- 207. Issues—Imputed Conduct—Burden of Proof.
- 208. Issues—Imputed Conduct—Relationship Admitted.
- 209. Issues—Agent or Independent Contractor—Burden of Proof.
- 210. Admitted Liability.
- 211. Issues—Fraudulent Concealment to Suspend the Running of the Statute of Limitations.
- 212. Duration of Suspension of Running of Statute of Limitations.

AMI 201

ISSUES—CASE SUBMITTED ON INTERROGATORIES

After I have completed my instructions to you on the law in this case, you will be given a number of written questions called interrogatories. These interrogatories present the issues of fact that you must decide. In order that you may be fully acquainted with the issues of fact, which are being submitted in this case for your determination, I will now read these in-

interrogatories, some or all of which you may be called upon to answer. You should keep these in mind as I explain the law applicable to this case.

[Here insert interrogatories]

NOTE ON USE

This instruction should be given in every case that is submitted on interrogatories.

See Chapter 36, II. Multiparty Automobile Collision for an illustrative set of interrogatories.

COMMENT

It is within the trial court's discretion whether to submit a case on a general verdict or interrogatories. *Hough Cont'l Leasing Corp.*, 275 Ark. 340, 344, 630 S.W.2d 19, 21–22 (1982); *City of Searcy v. Roberson*, 256 Ark. 1081, 1094, 511 S.W.2d 627, 634 (1974); *Cobb v. Atkins*, 239 Ark. 151, 157, 388 S.W.2d 8, 11 (1965).

If interrogatories are given, each answer to each interrogatory is considered a separate verdict on that particular issue of fact. *McChristian v. Hooten*, 245 Ark. 1045, 1053, 436 S.W.2d 844, 849 (1969) (approving an instruction so stating). Accordingly, a different majority of jurors may render a verdict as to each interrogatory as long as the required number agree. *Id.* (approving an instruction advising that “in order to answer any interrogatory, at least nine of you must agree” and clarifying that this does not necessarily mean the same nine jurors).

Whether to submit a case on a general verdict or interrogatories may have implications on appeal and on the availability of prejudgment interest. Therefore, attorneys should consider whether to request the submission of claims or itemized damages on interrogatories instead of a general verdict or whether objection to instructions will be sufficient to preserve error.

With respect to appellate review, a jury verdict rendered on a general verdict form is considered to be “an indivisible entity” or “a finding upon the whole case.” *Tyson Foods, Inc. v. Davis*, 347 Ark. 566, 576, 66 S.W.3d 568, 578 (2002). The Arkansas Supreme Court has stated that “[w]hen special interrogatories concerning liability or damages are not requested, and this court is left in the position of not knowing the basis for the jury’s verdict, we will neither question nor theorize about the jury’s findings.” *Union Pac. R.R. Co. v. Barber*, 356 Ark. 268, 293, 149 S.W.3d 325, 341 (2004) (denying defendant’s sufficiency of evidence

challenge to two of the five negligence theories argued and stating that it would not speculate on which theory of negligence the jury accepted in returning its general verdict form). Thus, in order to preserve error in the submission of one of several claims to a jury, the Arkansas Supreme Court has held that certain claims should be submitted on interrogatories instead of a general verdict. *S. Beach Beverage Co. v. Harris Brands, Inc.*, 355 Ark. 347, 352, 138 S.W.3d 102, 104–05 (2003) (affirming jury's general verdict on claims for promissory estoppel and franchise practices act and noting that judgment would be affirmed if the plaintiff could prevail on either theory). *See also Allstate Ins. Co. v. Dodson*, 2011 Ark. 19, at 21–22 (rejecting the appellant insurance company's challenge to the jury's damage award for defamation and finding that the appellant's failure to request a special interrogatory precluded argument that it was improperly held jointly and severally liable for damages caused by other, non-party insurance companies that had made the same slanderous statements); *Med. Assurance Co. v. Castro*, 2009 Ark. 93, at 7–8, 302 S.W.3d 592, 597 (refusing to address defendant's argument that evidence was insufficient to support future damages where verdict was rendered on a general verdict form without itemizing elements of damage award); *S. Cent. Ark. Elec. Coop. v. Buck*, 354 Ark. 11, 19, 117 S.W.3d 591, 596 (2003) (refusing to address appellant's argument, made for the purpose of asserting subrogation rights against appellee, that the general verdict included sums paid by appellant to appellee); *Esry v. Carden*, 328 Ark. 153, 157–59, 942 S.W.2d 846, 848–49 (1997) (denying appellant-plaintiff's challenge to a defense verdict where the appellee-defendant had admitted fault for the accident, noting that the general verdict could have been based upon a finding of no liability, no damages, or both).

On the other hand, the Arkansas Supreme Court has also held that a general verdict must be reversed if one of multiple theories was erroneously submitted over objection to the jury being instructed on the defective claim. *Dillard Dept. Stores, Inc. v. Adams*, 315 Ark. 303, 306–07, 867 S.W.2d 442, 444 (1993). *See also England v. Costa*, 364 Ark. 116, 125, 216 S.W.3d 585, 591 (2005) (reversing the general verdict because an erroneous instruction was given from which prejudice due to the error could not be ascertained).

Submission of tort damages on a general verdict may affect the availability of prejudgment interest. *See East Texas Motor Freight Lines, Inc. v. Freeman*, 289 Ark. 539, 713 S.W.2d 456, 462 (1986) (modifying judgment to exclude prejudgment interest where the general verdict included damages for property damage and personal injuries on the grounds that a plaintiff intending to claim prejudgment interest “must request a specific verdict on property damage”); *Williams v. Shackelford*, 2017 Ark. App. 149, 515 S.W.3d 642 (reversing award of prejudgment interest where damages awarded on general verdict because “there was no liquidated amount on which to base an award of prejudgment interest.”).

Research References

West's Key Number Digest
Trial ¶215, 352.7

Legal Encyclopedias
C.J.S., Trial §§ 638, 981, 1095, 1121, 1137 to 1139

AMI 202

**MEANING OF BURDEN OF PROOF AND
PREPONDERANCE OF THE EVIDENCE**

A party who has the burden of proof on a proposition must establish it by a preponderance of the evidence, unless the proposition is so established by other proof in the case [or unless a different standard of proof is required by another instruction]. "Preponderance of the evidence" means the greater weight of evidence. The greater weight of evidence is not necessarily established by the greater number of witnesses testifying to any fact or state of facts. It is the evidence which, when weighed with that opposed to it, has more convincing force and is more probably true and accurate. If, upon any issue in the case, the evidence appears to be equally balanced, or if you cannot say upon which side it weighs heavier, you must resolve that question against the party who has the burden of proving it.

NOTE ON USE

This instruction should be given in every case.

Use the bracketed material when plaintiff claims punitive damages or claims damages based upon defamation of a public figure or invasion of privacy by false light.

COMMENT

A mere preponderance is all that is necessary to meet the burden. *Hays v. Williams*, 115 Ark. 406, 171 S.W. 882 (1914). It is error to imply that anything more than preponderance is needed: *Whaley v. Niven*, 175 Ark. 839, 1 S.W.2d 3 (1927) ("fair" preponderance); *Sealy Mattress Co. v. Southern Cotton Oil Co.*, 167 Ark. 405, 268 S.W. 611 (1925) ("clear" preponderance).

"Preponderance of the evidence" means evidence of greater convincing force. *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947). A preponderance is not to be established solely by the

greater number of witnesses. *Louisiana & A. Ry. Co. v. Muldrow*, 181 Ark. 674, 27 S.W.2d 516 (1930); *Martin v. Vaught*, 128 Ark. 293, 194 S.W. 10 (1917).

For claims for punitive damages accruing on or after March 25, 2003, the burden of proof is clear and convincing evidence. Ark. Code Ann. § 16-55-207 (2003). See AMI 2218. One of the elements for recovery on a claim for damages based upon defamation of a public figure or invasion of privacy by false light requires proof by clear and convincing evidence. See AMI 408 and 423.

Research References

West's Key Number Digest ...
Trial ¶¶ 195, 205, 212, 234(7), 237

Legal Encyclopedias ...
C.J.S., Trial §§ 619, 658 to 660, 684, 747, 755 to 756, 768 to 772

AMI 203

ISSUES—CLAIM FOR DAMAGES BASED ON
NEGLIGENCE—BURDEN OF PROOF

_____ claims damages from _____ and has the
(Plaintiff) (defendant)
burden of proving each of three essential
propositions:

First, that *[he][she][it]* has sustained damages;

Second, that _____ *[and _____, or one of*
(defendant)
them,] was negligent;

And third, that such negligence was a proximate
cause of _____'s damages.
(plaintiff)

[If you find from the evidence in this case that
each of these propositions has been proved, then
your verdict should be for _____ (against the party or
(plaintiff)
parties found to be negligent); but if, on the other
hand, you find from the evidence that any of these
propositions has not been proved, then your verdict
should be for _____].
(defendant)

NOTE ON USE

Use the bracketed portion of paragraph "Second" only when the plaintiff claims damages from alleged joint tortfeasors.

Do not use the final bracketed paragraph when affirmative defenses such as negligence of the claimant are in issue. See AMI 206.

In multi-party cases or in cases involving liability based upon alleged misconduct other than negligence, use AMI 205.

Do not use the final bracketed paragraph when the case is submitted on interrogatories.

In cases involving a complaint by a plaintiff against a defendant who has asserted a counterclaim, use AMI 204.

COMMENT

This instruction has been cited with approval in *Schaeffer v. McGhee*, 286 Ark. 113, 115, 689 S.W.2d 537, 538 (1985); and *Dovers v. Stephenson Oil Co.*, 354 Ark. 695, 704, 128 S.W.3d 805, 810–811 (2003); and held to be a correct statement of the law in *Blankenship v. Burnett*, 304 Ark. 469, 472, 803 S.W.2d 539, 541 (1991).

In 2003, Ark. Code Ann. § 16-55-202 was amended to provide that with respect to all affected causes of action accruing on or after March 25, 2003, the fault of non-parties can be considered in assessing percentages of fault when either the plaintiff has entered into a settlement agreement with a non-party or when a defendant files the statutory 120-day notice prior to trial that a non-party was wholly or partially at fault. In *Johnson v. Rockwell Automation, Inc.*, 2009 Ark. 241, 308 S.W.3d 135, however, the Arkansas Supreme Court ruled that Ark. Code Ann. § 16-55-202 contravenes the separation of powers provisions of the Arkansas Constitution, Article 4, § 2 and Amendment 80, § 3, by effectively establishing a procedure for litigating the fault of non-parties “that conflicts with our ‘rules of pleadings, practice and procedure.’” *Johnson, supra*, 2009 Ark. 241, at 6 (quoting Amendment 80, § 3). The court held both subsections 202(a) and (b) unconstitutional. *Id.* at 8. *See also McCoy v. Augusta Fiberglass Coatings, Inc.*, 593 F.3d 737, 743–44 (8th Cir. 2010) (ruling that *Johnson* mooted claim to apportionment of fault to non-party because law reverted to what it was before passage of 2003 amendment to Ark. Code Ann. § 16-55-202). The Note on Use to this Instruction has been modified accordingly to delete reference to assignment of fault to non-parties under Ark. Code Ann. § 16-55-202.

Research References

West's Key Number Digest
Negligence ◊1722

Legal Encyclopedias
C.J.S., Negligence §§ 995, 999 to 1000

AMI 204

**ISSUES—COMPLAINT AND COUNTERCLAIM
BASED ON NEGLIGENCE OR FAULT—BURDEN OF
PROOF**

 and claim damages from each other.
(Plaintiff) (defendant)

A party claiming damages has the burden of proving each of three essential propositions:

First, that *[he][she][it]* has sustained damages;

Second, that the party from whom *[he][she][it]* seeks to recover was negligent;

And third, that such negligence was a proximate cause of the damages sustained by the claiming party.

Each party contends that the other acted with negligence which was a proximate cause of *[his][her][its]* own damages. Each has the burden of proving this contention.

NOTE ON USE

Use this instruction when there is only one plaintiff and one defendant.

In multi-party cases or in cases involving liability based upon alleged misconduct other than negligence, use AMI 205.

When AMI 301 is given, substitute “fault” for “negligence.”

Research References

West's Key Number Digest
Negligence ¶1722

Legal Encyclopedias
C.J.S., Negligence §§ 995, 999 to 1000

AMI 205

ISSUES—MULTIPLE CLAIMS—VARYING STANDARDS OF CARE—BURDEN OF PROOF

 [also] claims damages from
(Claiming party) (party being sued)
and has the burden of proving each of three essential
propositions:

First, that [he][she][it] has sustained damages;

Second, that [and ———, or one of
(alleged tortfeasor)
them]

(a) [was negligent;]

(b) [intended to harm (or) (and) (his)
(claiming party)
(her) (its) property;]

(c) [failed to use the highest degree of care;]

(d) [and that as to such (neg-
(alleged principal, partner, etc.)
ligence) (or) (intentional conduct) (failure) is
chargeable to (it) (him) (her) (them);]

And third, that such [negligence] [or] [intentional
conduct] [failure] was a proximate cause of the dam-
ages of .
(claiming party)

[If you find from the evidence in this case that
each of these propositions has been proved, then
your verdict should be for (against the party
(claiming party)
or parties found to be liable); but if, on the other hand,
you find from the evidence that any of these proposi-
tions has not been proved, then your verdict should

be for _____.]
(party being sued)

NOTE ON USE

Repeat this instruction as necessary to delineate all claims being submitted to the jury. Use the bracketed word “also” in the first sentence each time the instruction is repeated.

Use the bracketed portion of the first line of paragraph “Second” when the claiming party seeks damages from alleged joint tortfeasors.

The “alleged tortfeasor” in paragraph “Second” may not necessarily be a party. For example, if a principal alone is sued for the alleged tortious conduct of his agent, the agent should be named or otherwise identified.

Each time this instruction is repeated, the appropriate alternative, (a) through (d), should be used.

Alternative (a) will be sufficient in most cases. Use alternative (c) in a claim by a passenger against a common carrier. Alternative (d) should follow the appropriate alternative when it is contended that the conduct of the “alleged tortfeasor” is imputed to another party and the jury is also required to determine the issue of whether a relationship permitting imputation existed at the time of the occurrence. In this event AMI 207 or 209 should be given immediately following this instruction. If the relationship, on the other hand, is admitted, do not use alternative (d). See AMI 208. Do not use paragraph (d) when the case is submitted on interrogatories.

When AMI 301 is given, substitute “fault” for “negligence.”

Do not use the final bracketed paragraph when the case is submitted on interrogatories or when affirmative defenses are in issue. See AMI 206.

Research References

West's Key Number Digest
Negligence §1722

Legal Encyclopedias
C.J.S., Negligence §§ 995, 999 to 1000

AMI 206

ISSUES—AFFIRMATIVE DEFENSES—BURDEN OF PROOF

_____ contends that [there was (*negligence*)
 (Defendant)
 (*fault*) (*on the part of*) (*which is chargeable to*) _____,
 (plaintiff)
 which was a proximate cause of the (*injury*) (*dam-*
ages)] [and _____ (*describe the other affirmative*
defense)]. _____ has the burden of proving this
 (Defendant)
 contention.

NOTE ON USE

Repeat this instruction for each party claiming damages when the evidence justifies its use.

If identical affirmative defenses to a particular claim are relied upon by more than one party, name all such parties in the first blank space.

Describe any other affirmative defense or defenses other than comparative fault in the second bracketed blank space.

When AMI 301 is given, use “fault,” rather than “negligence.”

COMMENT

This instruction must be given when the issue of negligence on the part of a party claiming damages is raised as a defense. *Druckenmiller v. Cluff*, 316 Ark. 517, 873 S.W.2d 526 (1994); *Hill Constr. Co. v. Bragg*, 291 Ark. 382, 725 S.W.2d 538 (1987); *Holiday Inns, Inc. v. Drew*, 276 Ark. 390, 635 S.W.2d 252 (1982).

In 2003, Ark. Code Ann. § 16-55-202 was amended to provide that with respect to all affected causes of action accruing on or after March 25, 2003, the fault of non-parties can be considered in assessing percentages of fault when either the plaintiff has entered into a settlement agreement with a non-party or when a defendant files the statutory 120-day notice prior to trial that a non-party was wholly or partially at fault. In *Johnson v. Rockwell Automation, Inc.*, 2009 Ark. 241, 308 S.W.3d 135, however, the Arkansas Supreme Court ruled that Ark. Code Ann. § 16-55-202 contravenes the separation of powers provisions of the Arkansas Constitution, Article 4, § 2 and Amendment 80, § 3, by

effectively establishing a procedure for litigating the fault of non-parties “that conflicts with our ‘rules of pleadings, practice and procedure.’” *Johnson, supra*, 2009 Ark. 241, at 6 (quoting Amendment 80, § 3). The court held both subsections 202(a) and (b) unconstitutional. *Id.* at 8. See also *McCoy v. Augusta Fiberglass Coatings, Inc.*, 593 F.3d 737, 743–44 (8th Cir. 2010) (ruling that *Johnson* mooted claim to apportionment of fault to non-party because law reverted to what it was before passage of 2003 amendment to Ark. Code Ann. § 16-55-202). The Note on Use to this Instruction has been modified accordingly to delete reference to assignment of fault to non-parties.

Research References

West's Key Number Digest
Negligence §1722, 1743

Legal Encyclopedias
C.J.S., Negligence §§ 995, 999 to 1000, 1005, 1010 to 1015, 1017 to 1001.

Research References

West's Key Number Digest

Joint Ventures ⇨78; Labor and Employment ⇨3106(2); Partnership ⇨779;
Principal and Agent ⇨194(2)

Legal Encyclopedias

C.J.S., Joint Ventures §§ 58, 71 to 70

AMI 208

ISSUES—IMPUTED CONDUCT—RELATIONSHIP ADMITTED

At the time of the occurrence

_____ (principal, employer, joint
venturer or partner) and _____ (agent, employee, joint venturer or partner) were

[principal and agent] [employer and employee] [participating in a joint enterprise] [partners]. Therefore, any [negligence] [or] [intentional conduct] [failure to use the highest degree of care] [_____] on the
(other type of fault)

part of _____ is charged to
(agent, employee, joint venturer or partner)
[with respect to the
(principal, employer, joint venturer or partner)
claims of _____].
(plaintiff)

NOTE ON USE

This instruction is used when the relationship permitting the imputation of conduct is admitted. See Chapter 7 for instructions on issues related to agency, employment, joint enterprise (AMI 712), partnership (AMI 710), and scope of employment (employee driving employer's vehicle) (AMI 703).

Do not use this instruction when the case is submitted on interrogatories.

COMMENT

A modification of this instruction, reflecting that a parent's cause of action for a child is derivative and subject to the comparative negligence of the child, was approved in *Kirkendoll v. Hogan*, 267 Ark. 1083, 593 S.W.2d 498 (1980).

If a defendant employer or principal admits vicarious liability for the negligence of the employee or agent, the plaintiff may not pursue a claim for negligent entrustment, hiring, or retention against such defendant. *Elrod v. G&R Constr. Co.* 275 Ark. 151, 154, 628 S.W.2d 17, 19 (1982); *Kyser v. Porter*, 261 Ark. 351, 358, 548 S.W.2d 128, 132 (1977). The court in *Elrod* further ruled that such admission precludes a plaintiff who seeks punitive damages on a negligent entrustment the-

ory from having evidence of the employee's or agent's bad driving record submitted to the jury, at least absent indication that such record would put defendant on notice that its driver would commit a willful, wanton, or intentional act. 275 Ark. at 154–56, 628 S.W.2d at 18–20. *See also* Moore v. Daniel Enterprises, Inc., 2006 WL 1155948 (W.D. Ark. April 28, 2006) (applying *Elrod*). The plaintiff may proceed against the employer, however, for its independent acts of negligence. *See* Regions Bank v. White, 2009 WL 3148732 (E.D. Ark. Sept. 24, 2009) (plaintiff allowed to proceed on claims that the employer was itself negligent in failing to have a policy requiring the use of warning triangles behind a stopped vehicle, to adequately train drivers regarding the placement of the triangles, to have an escort vehicle, and to maintain the truck).

Research References

West's Key Number Digest

Joint Ventures ⚡78; Labor and Employment ⚡3106(2); Partnership ⚡779; Principal and Agent ⚡194(1)

Legal Encyclopedias

C.J.S., Joint Ventures §§ 58, 71 to 70

AMI 209

ISSUES—AGENT OR INDEPENDENT
CONTRACTOR—BURDEN OF PROOF

(Alleged principal or employer) contends that (alleged agent or employee)
 was an independent contractor [for whose conduct
 (he) (she) (it) is not responsible], instead of an (agent)
 (employee) [for whose conduct (he) (she) (it) would
 be responsible]. (Alleged principal or employer) has the burden of
 proving that (alleged agent or employee) was an independent
 contractor.

NOTE ON USE

Use this instruction only if it is undisputed that the alleged agent was performing a service for and was being compensated by the principal. Otherwise use AMI 207.

AMI 707 should be given with this instruction.

Do not use bracketed clauses when the case is submitted on interrogatories.

COMMENT

When it is shown that the person causing the injury was at the time rendering a service for the defendant and being paid for that service, and the facts presented are as consistent with the master-servant relationship as with the independent contractor relationship, then the burden is on the one asserting the independence of the contractor to show the true relationship of the parties. *ConAgra Foods, Inc. v. Draper*, 372 Ark. 361, 276 S.W.3d 244 (2008) (alleged agent hauled poultry for alleged principal); *Schuster's, Inc. v. Whitehead*, 291 Ark. 180, 722 S.W.2d 862 (1987) (alleged agent, the grandson of the president of the alleged principal, installed a ceiling fan for a customer of the alleged principal); *Phillips Coop. Gin Co. v. Toll*, 228 Ark. 891, 311 S.W.2d 171 (1958) (the alleged agent hauled cotton seed for the alleged principal).

Research References

West's Key Number Digest
 Labor and Employment Ⓒ3181(7)

AMI 210

ADMITTED LIABILITY

_____ has admitted liability for any [compensatory] damages sustained by _____ which were proximately caused by the occurrence. You need only decide what those [compensatory] damages are and what amount _____ should recover. _____ has the burden of proving the amount of those damages.

(Defendant) (plaintiff) (Plaintiff)

NOTE ON USE

Use the bracketed word “compensatory” when compensatory damages are admitted and there is an issue as to punitive damages.

Do not use this instruction when the negligence of the plaintiff is an issue. See AMI 2101 et seq.

COMMENT

An injured person may be entitled to nominal damages even in the absence of a showing of actual damages. *Adams v. Adams*, 228 Ark. 741, 310 S.W.2d 813 (1958); *Cathey v. Arkansas Power & Light Co.*, 193 Ark. 92, 97 S.W.2d 624 (1936).

The fact that one party admits negligence does not preempt consideration of any negligence of another party. *Bryant v. Eifling*, 301 Ark. 172, 782 S.W.2d 580 (1990). In such cases, it may be necessary to use a modified version of the appropriate comparative fault instruction. See AMI 2101 et seq.

Research References

West's Key Number Digest
Damages ⇨ 209

Legal Encyclopedias
C.J.S., Damages §§ 399, 424 to 445

AMI 211

**ISSUES—FRAUDULENT CONCEALMENT TO
SUSPEND THE RUNNING OF THE STATUTE OF
LIMITATIONS**

The claim of _____
(plaintiff) is barred by the statute of limitations unless _____
(plaintiff) proves that *[his][her][its]* claim was fraudulently concealed by _____. To suspend
(defendant) the running of the statute of limitations, _____
(plaintiff) has the burden of proving three essential propositions:

First, [that _____
(defendant) committed a positive act of concealment that was distinct from the conduct that is the basis for the claim and that was so secretly planned and executed as to keep the claim hidden;]
[or] [that the conduct that is the basis for the claim was perpetrated in a way that it conceals itself;]

Second, that _____
(plaintiff) exercised reasonable diligence to discover the facts of *[his][her][its]* claim; and

Third, that _____
(plaintiff) did not know or have reason to know of the basis for *[his][her][its]* claim before _____
(the
_____ date to define applicable limitations period).

This burden is not met by proof of mere ignorance on the part of the _____
(plaintiff) or by proof of silence by one who is under no obligation to speak or disclose information.

[If you find from the evidence in this case that

each of these propositions has been proved, then you should consider the other instructions pertaining to _____'s claim; but if, on the other hand, you find from (plaintiff) the evidence that any of these propositions has not been proved, then your verdict should be for _____.] (defendant)

NOTE ON USE

Do not use the last bracketed paragraph if the case is submitted on interrogatories.

Select one of the bracketed paragraphs for the first proposition depending on the nature of the alleged concealment, or submit them as alternatives if warranted by the evidence.

Complete the blank in the third proposition with the date that defines the applicable limitations period as determined in relation to the date of the complaint, e.g., if the underlying action is a fraud claim, the date would be that of the day three years prior to the date the complaint was filed.

COMMENT

This instruction is based on *Martin v. Arthur*, 339 Ark. 149, 3 S.W.3d 684 (1999); *First Pyramid Life Ins. Co. of Am. v. Stoltz*, 311 Ark. 313, 843 S.W.2d 842 (1992); *Chalmers v. Toyota Motor Sales, USA, Inc.*, 326 Ark. 895, 935 S.W.2d 258 (1996); *Curry v. Thornsberry*, 81 Ark. App. 112, 98 S.W.3d 477 (2003); and *Adams v. Wolf*, 73 Ark. App. 347, 43 S.W.3d 757 (2001).

The doctrine of fraudulent concealment has been applied to a variety of different causes of action. See, e.g., *Smothers v. Clouette*, 326 Ark. 1017 1020-21, 934 S.W.2d 923, 925-26 (1996) (legal malpractice); *Alexander v. Flake*, 322 Ark. 239, 245-46, 910 S.W.2d 190, 193-94 (1995) (breach of fiduciary duty); *Jones v. Cent. Ark. Radiation Therapy Inst., Inc.*, 270 Ark. 988, 989, 607 S.W.2d 334, 335 (1980) (medical malpractice).

A statutory tolling provision governs actions for medical injury involving a foreign object in the body, Ark. Code Ann. § 16-114-203(b), but the doctrine of fraudulent concealment may still apply in a case where the surgeon knew that the foreign object remained in the patient and failed to tell the patient. *Howard v. Nw. Ark. Surgical Clinic, P.A.*, 324 Ark. 375, 383, 921 S.W.2d 596, 600 (1996).

In *Meadors v. Still*, the court defined the standard of review when considering whether the statute of limitations has been tolled due to

fraudulent concealment. 344 Ark. 307, 312, 40 S.W.3d 294, 298 (2001). A defendant has the burden of affirmatively pleading the statute of limitations as a defense. However, once it is clear from the face of the complaint that the action is barred by the applicable limitations period, the burden shifts to the plaintiff to prove by a preponderance of the evidence that the statute of limitations was in fact tolled. While the question of fraudulent concealment is normally a question of fact that is not suited for summary judgment, when the evidence leaves no room for a reasonable difference of opinion, the trial court may resolve fact issues as a matter of law.

In *Delanno, Inc. v. Peace*, the court applied the foregoing standard to an attorney who stood in a fiduciary relationship to his client. 366 Ark. 542, 544–49, 237 S.W.3d 81, 83–87 (2006). The court stated that to hold otherwise would unduly restrict the applicability of the statute of limitations to legal malpractice actions based upon misstatements by attorneys and would operate to eliminate a client's duty to exercise reasonable diligence in analyzing the accuracy of the attorney's statements. Compare *Smothers*, 326 Ark. at 1012, 934 S.W.2d at 926 *supra* (fact questions existed as to whether statute of limitations was tolled in attorney malpractice action by affirmative acts of fraud or concealment and as to when the alleged negligent act occurred).

In *Bomar v. Moser*, the court applied the *Meadors* standard to another attorney malpractice case and distinguished *Delanno*. 369 Ark. 123, 130–33, 251 S.W.3d 234, 241–43 (2007). First, the client in *Bomar* produced evidence that the defendant attorneys committed positive acts of fraud and concealed their wrongdoing as opposed to merely making “an inadvertent misstatement of the facts,” as in *Delanno*. Second, unlike the circumstances in *Delanno*, there was a material question of fact on the issue of whether it was unlikely that the plaintiff client could have discovered concealment of the defendant's wrongful acts through the exercise of reasonable diligence.

The Court of Appeals also distinguished *Dellano* in a case involving alleged fraudulent concealment of termite and other damage by a pest-control company. *Russenberger v. Thomas Pest Control, Inc.*, 2012 Ark. App. 86, at 8–11. In reversing the trial court's grant of a motion to dismiss, the court noted that, unlike the inadvertence shown in *Delanno*, the plaintiff had alleged that the defendants actually knew of the damage and concealed it from her for years, and that she neither was put on notice as was the plaintiff in *Delanno* nor could have discovered the damage herself in the exercise of reasonable diligence. *Id.* at 10–11.

In *Technology Partners, Inc. v. Regions Bank*, the court applied the *Meadors* standard in the context of a bank's failure to disclose information about one customer's activity to another customer. 97 Ark. App. 229, 234, 245 S.W.3d 687, 691 (2006). The court held that fraudulent

concealment requires more than the continuation of a prior nondisclosure and there must be evidence that the defendant's actions were designed to conceal themselves or that the defendant engaged in cunning or artifice to conceal its conduct or to prevent the plaintiff from learning of the defendant's actions. *Id.* at 235-36, 245 S.W.3d at 692-93.

Research References

West's Key Number Digest
Limitation of Actions §200(1)

Legal Encyclopedias
C.J.S., Limitations of Actions §§ 138 to 142

AMI 212

DURATION OF SUSPENSION OF RUNNING OF
STATUTE OF LIMITATIONS

 contends that the limitations period was
(Defendant)
only suspended by the fraudulent concealment. To
establish that the limitations period commenced to
run, has the burden to prove one of the fol-
(defendant)
lowing propositions:

First, that discovered the basis for [his]
(plaintiff)
[her][its] claim; or

Second, that should have discovered the
(plaintiff)
basis for [his][her][its] claim by the exercise of rea-
sonable diligence.

NOTE ON USE

Use this instruction only if AMI 211 is used and there is an issue concerning the duration of the tolling of the limitations period. An interrogatory may require the jury to fix a specific date.

COMMENT

A concealed fraud suspends the running of the statute of limitations, and the suspension remains in effect until the party having the cause of action discovers the fraud or should have discovered it by the use of reasonable diligence. *Adams v. Wolf*, 73 Ark. App. 347, 43 S.W.3d 757 (2001).

Research References

West's Key Number Digest
Limitation of Actions ⇨200(1)

Legal Encyclopedias
C.J.S., Limitations of Actions §§ 138 to 142

CHAPTER 3

NEGLIGENCE, FAULT, AND ORDINARY CARE

Table of Instructions

AMI

- 301. Fault—Definition.
- 302. Negligence—Definition.
- 303. Ordinary Care—Definition.
- 304. Ordinary Care of a Minor.
- 305. Duty to Use Ordinary Care.
- 306. Definition of Assumption of Risk.
- 307. Issues—Nonparty Fault.
- 307A. Illustrative Interrogatories—Multiple Defendants—Nonparties Involved.

AMI 301

FAULT—DEFINITION

When I use the word “fault” in these instructions, I mean [negligence] [and] [assumption of risk] [and] [breach of warranty] [and] [willful misconduct] [and] [supplying a product in a defective condition].

NOTE ON USE

Use this instruction when the term “fault” is used in another instruction. It may be preferable to give this instruction immediately before the instruction using the term “fault.”

COMMENT

This instruction is based on Ark. Code Ann. § 16-64-122(c).

Comparative fault is inapplicable in cases involving intentional torts. *Whitlock v. Smith*, 297 Ark. 399, 762 S.W.2d 782 (1989); *Kellerman v. Zeno*, 64 Ark. App. 79, 983 S.W.2d 136 (1998).

As to assumption of risk, see Comment to AMI 306.

Research References

West's Key Number Digest

Negligence \Rightarrow 1720, 1743

Legal Encyclopedias

C.J.S., Negligence §§ 995 to 1007, 1010 to 1015, 1017 to 1019

AMI 302

NEGLIGENCE—DEFINITION

When I use the word “negligence” in these instructions I mean the failure to do something which a reasonably careful person would do, or the doing of something which a reasonably careful person would not do, under circumstances similar to those shown by the evidence in this case. [It is for you to decide how a reasonably careful person would act under those circumstances.] [To constitute negligence an act must be one from which a reasonably careful person would foresee such an appreciable risk of harm to others as to cause *[him]**[her]* not to do the act, or to do it in a more careful manner.]

NOTE ON USE

Do not use the first bracketed sentence if AMI 303 is given.

Use the second bracketed sentence when foreseeability is an issue.

For the definition of negligence on the part of a physician, surgeon, or dentist, *see* AMI 1501; for that of an architect or engineer, *see* AMI 1204; and for that of an attorney, *see* AMI 1510.

COMMENT

The text of this instruction, including the bracketed sentence on foreseeability, was quoted as correctly declaring the law. *Service Communications, Inc. v. Wells*, 279 Ark. 378, 651 S.W.2d 100 (1983); *St. Mary's Hospital, Inc. v. Bynum*, 264 Ark. 691, 573 S.W.2d 914 (1978). The instruction was cited for the definition of negligence in *Wallace v. Broyles*, 331 Ark. 58, 961 S.W.2d 712 (1998) and *White River Rural Water Dist. v. Moon*, 310 Ark. 624, 839 S.W.2d 211 (1992).

The second bracketed sentence is based on *Hill v. Wilson*, 216 Ark. 179, 224 S.W.2d 797 (1949), and *Benson v. Shuler Drilling Co.*, 316 Ark. 101, 871 S.W.2d 552 (1994) (second bracketed sentence properly given).

Research References

West's Key Number Digest
Negligence ☞ 1720, 1740

Legal Encyclopedias
C.J.S., Negligence §§ 995 to 998, 1002 to 1010, 1016

AMI 303

ORDINARY CARE—DEFINITION

A failure to exercise ordinary care is negligence. When I use the words “ordinary care,” I mean the care a reasonably careful person would use under circumstances similar to those shown by the evidence in this case. It is for you to decide how a reasonably careful person would act under those circumstances.

NOTE ON USE

This instruction should be used only when the phrase “ordinary care” appears in some other instruction.

For the standard of care of a physician, surgeon, dentist, or other medical care provider, see AMI 1501; for that of an architect or engineer, see AMI 1204; for that of an attorney, see AMI 1510; and for that of a contractor, see AMI 1203.

COMMENT

This instruction was approved in *Wiles v. Webb*, 329 Ark. 108, 946 S.W.2d 685 (1997).

Research References

West's Key Number Digest
Negligence ⇨1720

Legal Encyclopedias
C.J.S., Negligence §§ 110 to 114, 1013

AMI 304

ORDINARY CARE OF A MINOR

[A minor is not held to the same standard of care as an adult.]

When I use the words "ordinary care" with respect to the minor _____, I mean that degree of care which a reasonably careful minor of [his][her] age and intelligence would use under circumstances similar to those shown by the evidence in this case. It is for you to decide how such a reasonably careful minor would act under those circumstances.

NOTE ON USE

If the minor is charged with negligence in the operation of a motor vehicle, AMI 305 should be used instead of this instruction.

Do not use the first sentence unless AMI 303 is also given.

COMMENT

The Arkansas Supreme Court has approved reference to the following qualities: "age," "intelligence," "understanding," "experience," "discretion," "capability," "capacity." Those most frequently approved were "age" and "intelligence" and ordinarily they should suffice. *See, e.g.,* Gates v. Plummer, 173 Ark. 27, 291 S.W. 816 (1927).

With reference to a normal adult the measure of ordinary care is standardized, but this is not true when dealing with a minor. The standard of care for a minor is fixed by "the maturity and capacity of the child, and this is to be determined in each case by the circumstances of that case." *Garrison v. St. Louis, I. M. & S. Ry. Co.*, 92 Ark. 437, 443, 123 S.W. 657, 660 (1909). This case, involving a boy of inferior intelligence, has been cited with approval many times.

On the other hand, a twelve-year-old who operated a "bush hog" was held to the standard of care of a reasonably careful adult. *Jackson v. McCuiston*, 247 Ark. 862, 448 S.W.2d 33 (1969); *Note*, 24 Ark. L. Rev. 379 (1970). In *dicta*, the Supreme Court stated that when a minor is performing or participating in an activity regulated by a regulation or statute which does not differentiate between the standard of care expected of the participant, whether a minor or an adult, then the

minor is held to the same standard of care as an adult when involved in the activity. *Newman v. Crawford Const. Co.*, 303 Ark. 641, 799 S.W.2d 531 (1990) (no proof connecting the injury to the minor's operation of a manual freight elevator). Otherwise, in order for a minor to be held to an adult standard of care, he must be engaging in an activity that is dangerous to others and is normally engaged in only by adults. *Purtle v. Shelton*, 251 Ark. 519, 474 S.W.2d 123 (1971) (adult standard does not apply to a 16-year-old minor hunting with a high-powered rifle).

A minor is required to exercise the same degree of care as an adult in operating a motor vehicle. *Harrelson v. Whitehead*, 236 Ark. 325, 365 S.W.2d 868 (1963).

Research References

West's Key Number Digest
 Infants ⇨1298, 1301 to 1303

Legal Encyclopedias
 C.J.S., Infants §§ 450 to 455

AMI 305

DUTY TO USE ORDINARY CARE

A. It was the duty of _____, before and at the
(defendant)
 time of the occurrence, to use ordinary care for the
 safety of [_____] [and] [(his) (her) property] [the prop-
(plaintiff)
 erty of _____].
(plaintiff)

B. It was the duty of [all] [both] persons involved
 in the occurrence to use ordinary care for their own
 safety and the safety of [others] [and their property]
 [the property of others].

C. It was the duty of both _____ and _____ to
(plaintiff) (defendant)
 use ordinary care for their own safety and the safety
 of [others] [and their property] [the property of
 others].

NOTE ON USE

Paragraph A should be used when negligence on the part of the plaintiff is not an issue.

Paragraph B should be used when negligence on the part of the plaintiff is an issue or when the jury is to consider a counter claim or multi-party suit.

Paragraph C should be used when there is a non-negligent claimant and two or more alleged tortfeasors.

For the standard of care of a physician, surgeon, or dentist see AMI 1501; for that of an architect or engineer, see AMI 1204; for that of an attorney, see AMI 1510; and for that of a contractor, see AMI 1203.

COMMENT

A jury instruction adequately conveyed an employer's duty to use ordinary care when it gave a modified instruction that combined Part A and Part B of this instruction. *Escobar v. A&A Orchard, LLC*, 2021 Ark.

App. 128 (jury allocated fault 51%-49% between employer and employee when the employee fell off a wobbly ladder picking fruit on a windy day causing injury).

Research References

West's Key Number Digest
Negligence \approx 1720

Legal Encyclopedias
C.J.S., Negligence §§ 995 to 998, 1003 to 1007, 1010

AMI 306

DEFINITION OF ASSUMPTION OF RISK

When I use the term “assumption of risk,” I mean a person voluntarily exposing *[himself][herself]* to a dangerous situation inconsistent with *[his][her]* safety, knowing of the danger and risk of injury from it.

NOTE ON USE

This instruction should be given when “assumption of risk” appears in another instruction. See AMI 301.

This instruction should be used only when comparative fault based upon assumption of risk is an issue.

COMMENT

The common law doctrine of assumption of risk is no longer applicable as a separate theory. *Ouachita Wilderness Institute, Inc. v. Mergen*, 329 Ark. 405, 947 S.W.2d 780 (1997); *Dawson v. Fulton*, 294 Ark. 624, 745 S.W.2d 617 (1988). The term, however, appears in the statutory definition of fault, Ark. Code Ann. § 16-64-122(c), and, therefore, the Committee has concluded that a definition of the term is required.

Research References

West's Key Number Digest
Negligence ¶1747

Legal Encyclopedias
C.J.S., Negligence §§ 995, 1005, 1011 to 1015

AMI 307

ISSUES—NONPARTY FAULT

 claims and has the burden of proving that
 (Defendant) [was][were] at fault and that [his][her-
 (nonparty person or entity)] [its][their] fault was a proximate cause of
 (plaintiffs)
 injuries.

Even though [is][are] not a party
 (nonparty person or entity) to this case, you are to determine whether has
 (defendant) met that burden. If you find that has met that
 (defendant) burden, you are to determine to what extent
 (nonparty) fault contributed to injuries,
 (person's or entity's) (plaintiffs) expressed as a percentage of 100 percent.

The fault of any one person or entity may be greater or lesser than that of another, or may be zero, but the total amount of fault, if you find any, must add up to 100 percent. This will be clear from the verdict form.

 NOTE ON USE

This instruction applies to claims accruing on or after August 16, 2013, for personal injury, medical injury, wrongful death, or property damage in which the defendant seeks allocation of fault to nonparties.

This instruction is subject to Ark. R. Civ. P. 9, 49, and 52. This instruction is to be given only if the court finds that:

1. the defendant has satisfied the notice requirements of Ark. R. Civ. P. 9(h) or the plaintiff has entered into a settlement agreement with the nonparty to whom the defendant seeks to allocate fault as provided in Ark. R. Civ. P. 49(c)(1)(A); and

2. the defendant has carried the burden of establishing a prima facie case of the nonparty's fault as provided in Ark. R. Civ. P. 49(c)(1)(B).

An interrogatory based on the sample provided in AMI 307A is to be given in conjunction with this instruction.

This instruction and AMI 307A assume that appropriate instructions—which may include those governing the definition of fault (AMI 301), the applicable standard and burden of proof (AMI 202 and 203), the applicable standard of care (e.g., AMI 303 and 305 for negligence or AMI 1008 for strict products liability), and proximate cause (e.g., AMI 501)—have been given.

Refer to the Comment to AMI 307A for a case that involves fault-apportionment to multiple parties and that also involves allegations of a plaintiff's fault.

COMMENT

Under Ark. R. Civ. P. 9, 49, and 52, fault may be allocated to nonparties via one of two routes—upon settlement with that nonparty or upon notice—and in either case the party seeking fault-allocation must produce sufficient evidence to establish a prima facie case of the nonparty's fault.

The Court of Appeals held that fault cannot be allocated to an immune nonparty because Ark. Code Ann. § 16-55-201(a) speaks in terms of the allocation of fault among “defendants” to the action but is silent as to the allocation of nonparty fault. *Industrial Iron Works, Inc. v. Hodge*, 2020 Ark. App. 56, 595 S.W. 3d 9. The Court also held that the UCATA does not allow for the allocation of fault of an immune nonparty because the right of contribution applies only to “joint tortfeasors” which is defined as “. . . two (2) or more persons or entities who may have joint or several liability in tort for the same injury to person or property whether or not judgment has been recovered against all or some of them.” Ark. Code Ann. § 16-55-201(1). Thus, the Court reasoned, an immune employer is not an entity that can have joint or several liability in tort.

For a historical account of nonparty fault in Arkansas, refer to the 2021 edition of the Arkansas Model Jury Instructions—Civil.

AMI 307A

ILLUSTRATIVE INTERROGATORIES—MULTIPLE
DEFENDANTS—NONPARTIES INVOLVED

(Insert signature lines after each interrogatory)

Verdict Form

1. Do you find from a preponderance of the evidence that _____ was [at fault] and that such [fault] was a proximate cause of any damages sustained by _____?
(defendant 1)
(plaintiff)

ANSWER: _____

(Yes or No)

2. Do you find from a preponderance of the evidence that _____ was [at fault] and that such [fault] was a proximate cause of any damages sustained by _____?
(defendant 2)
(plaintiff)

ANSWER: _____

(Yes or No)

3. Do you find from a preponderance of the evidence that _____ was [at fault] and that such [fault] was a proximate cause of any damages sustained by _____?
(nonparty 1)
(plaintiff)

ANSWER: _____

(Yes or No)

4. Do you find from a preponderance of the evidence that _____ was [at fault] and that such [fault] was a proximate cause of any damages sustained by _____?
(nonparty 2)
(plaintiff)

ANSWER: _____

(Yes or No)

5. Answer this interrogatory only if you have answered "Yes" to one or more of Interrogatories 1 through 4:

Do you find from a preponderance of the evidence that _____ [was at fault][assumed the risk] and that such [fault][assumption of risk] was a proximate cause of any damages [he][she] may have sustained?
(plaintiff)

ANSWER: _____

(Yes or No)

6. If you have answered more than one of Interrogatories 1 through 5 "Yes," then answer this Interrogatory:

Using 100% to represent the total responsibility for the occurrence and for any injuries or damages resulting from it, apportion the responsibility between the persons whom you have found to be responsible.

[To assign a percentage of fault to _____, you
(defendant 1)
must have answered yes to Question 1; otherwise
his/her percentage of fault is zero. To assign a per-
centage of fault to _____, you must have answered
(defendant 2)
yes to Question 2; otherwise, his/her percentage of
fault is zero. To assign a percentage of fault to _____
(nonparty
1), you must have answered yes to Question 3;
otherwise his/her percentage of fault is zero. To as-
sign a percentage of fault to _____, you must have
(nonparty 2)
answered yes to Question 3; otherwise, his/her per-
centage of fault is zero. To assign a percentage of
fault to _____, you must have answered yes to Ques-
(nonparty 2)
tion 4; otherwise, his/her percentage of fault is zero.
To assign a percentage of fault to _____, you must
(plaintiff)
have answered yes to Question 5; otherwise, his/her
percentage of fault is zero.]

ANSWER:

_____	%
Defendant 1	
_____	%
Defendant 2	
_____	%
Nonparty 1	
_____	%
Nonparty 2	
_____	%
Plaintiff	

Total 100%*

7. State the amount of any damages that you find from a preponderance of the evidence were sustained by _____ as a result of the occurrence. Do not reduce (plaintiff) those damages by any percentage of fault you may have assigned to _____; [or] _____; [or] _____. (plaintiff) [nonparty 1] [nonparty 2]

ANSWER:**

NOTE ON USE

These interrogatories may be used only in cases involving claims accruing on or after August 16, 2013, for personal injury, medical injury, wrongful death, or property damage, in which the defendant seeks allocation of fault to nonparties.

Fault allocation to multiple parties and nonparties requires interrogatories. This illustrative set is intended to provide an example of how to submit fault allocation to a jury and may be modified as necessary—for example, to state the applicable standards of proof and fault. It assumes that appropriate instructions—including those governing the definition of fault (AMI 301), the applicable standard and burden of proof (AMI 202 and 203), the applicable standard of fault (e.g., AMI 303 and 305 for negligence or AMI 1008 for strict products liability), and proximate cause (e.g., AMI 501)—have been given.

Interrogatories such as those suggested here are to be given in conjunction with AMI 307, but only if the conditions set forth in the Note on Use to AMI 307 are met.

If the case involves allegations that the plaintiff is also at fault, the

307A Interrogatory 6 should be omitted.

*The trial court may want to submit only Interrogatories 1 through 5 initially in order to determine whether Interrogatory 6 need be submitted at all. If this procedure is followed, the introductory sentence to In-

**The trial court may want the jury to answer fully only Interrogatories 1 through 5 or 1 through 6 as preferred, since these answers will be determinative.

court will need to determine as a matter of law whether, for purposes of Arkansas's Comparative Fault Act, Ark. Code Ann. § § 16-64-122(a)-(b), plaintiff's fault is to be compared only to named defendants or to all persons and entities to whom fault is allocated. This question is discussed in the Comment to this instruction.

COMMENT

These interrogatories are an adaptation and revision of the illustrative set provided in Chapter 36.

For explanation of the Note on Use regarding prospective use of these interrogatories, see the Comment to AMI 307.

The legal question noted in the last paragraph of the Note on Use to these interrogatories is whether in cases subject to the proportional-fault regime of the 2003 Civil Justice Reform Act ("CJRA"), plaintiff's fault is to be compared, for purposes of Arkansas's fifty-percent-bar form of modified comparative fault under Ark. Code Ann. § 16-64-122, to all tortfeasors combined, including nonparties, or to named defendants only. These interrogatories do not attempt to resolve the ultimate question of to whom plaintiff's fault, if any, is to be compared. The uncertainties surrounding that question are described below. Instead, these interrogatories ask the jury to allocate fault and to state the total amount of damages, leaving it to the trial court to apply comparative fault principles under the court's resolution of that legal question and to enter judgment accordingly. Thus, under either resolution of that question, these interrogatories do not call for the two-step process described in *Reed v. Malone's Mechanical, Inc.*, 854 F. Supp.2d 636, 645 (W.D. Ark. 2012).

The three reported cases to consider comparative fault and nonparties – *NationsBank v. Murray Guard, Inc.*, 343 Ark. 437, 36 S.W.3d 291 (2001) (plurality); *Hiatt v. Mazda Motor Corp.*, 75 F.3d 1252 (8th Cir. 1996); and *Reed v. Malone's Mech., Inc.*, 854 F. Supp.2d 636 (W.D. Ark. 2012) – all excluded nonparty fault from the comparative-fault determination for purposes of the fifty-percent bar. All three cited the Arkansas Comparative Fault Act, Ark. Code Ann. § 16-64-122(a), which provides in pertinent part that "liability shall be determined by comparing the fault chargeable to a claiming party with the fault chargeable to the party or parties *from whom the claiming party seeks to recover damages.*" (Emphasis added.) The courts reasoned that a plaintiff is not "seeking to recover damages" from a nonparty and therefore may not have nonparty fault included in the comparison.

Those three cases may not definitively resolve under current Arkansas law the precise question discussed here. Both *NationsBank* and *Hiatt* predate the Civil Justice Reform Act's partial abolition of joint and several liability and the provisions for allocation of fault to

nonparties adopted under Act 1116 of 2013 and the 2014 amendments to the Arkansas Rules of Civil Procedure. Thus, neither case involved the question whether nonparty fault is to be excluded from comparison to plaintiff's fault in determining whether plaintiff's recovery is barred (even if the plaintiff's fault may be less than fifty percent of all the fault that contributed to his or her injuries), yet included to reduce the recovery of a plaintiff whose claim survives the fifty-percent comparative fault bar. *NationsBank* does not cite *Hiatt*, itself a federal diversity case which framed the key issue as one of federal procedural law rather than Arkansas substantive law. The procedural issue in *Hiatt* implicated concerns about claim-splitting based on the plaintiff's attempt both to exclude the nonparty from the federal suit to preserve diversity jurisdiction yet to have the nonparty's fault included for comparative fault purposes. And *Hiatt*'s dicta concerning Arkansas's comparative fault statute cites not an Arkansas case but another federal case, *Booth v. United States Indus., Inc.*, 583 F. Supp. 1561 (W.D. Ark. 1984), which did not involve application of the fifty-percent bar.

Reed, the only post-CJRA case of the three, bases its comparative-fault analysis on *Hiatt*. With respect to the relationship between the CJRA and the Comparative Fault Act, *Reed* reasons that, "[s]ince the CJRA did not amend Arkansas' existing law in regard to comparative fault, the plaintiff cannot recover if his own fault is determined to be fifty percent (50%) or greater." 854 F. Supp.2d at 645. *Reed*'s CJRA reference is to the Act's savings clause with respect to comparative fault, which states that the CJRA's provisions "do not amend existing law that provides that a plaintiff may not recover any amount of damages if the plaintiff's own fault is determined to be fifty percent (50%) or greater." Ark. Code Ann. § 16-55-216 (emphasis added). A court could interpret that clause as referring to the comparative fault statute's provision that bars a plaintiff at equal or greater fault from recovering, and not including the portion of the comparative fault statute that limits comparison only to those from whom the plaintiff seeks to recover damages. A court could further conclude that this reading and the CJRA's overall proportional-fault policy are consistent with consideration for comparative fault purposes of the fault of any nonparty to whom fault is allocated for recovery-reduction purposes. So interpreted, current law thus would preclude a plaintiff from any recovery if his or her fault were "fifty percent (50%) or greater" than all those whose fault is ultimately taken into account, but would, if his or her fault were less than fifty percent, allow a plaintiff to recover only up to the amount of defendants' fault.

A related reason the three cases may not resolve the precise question here is that *Hiatt* and *NationsBank* both involved nonparty tortfeasors whom plaintiffs arguably could have sued in the same action but chose not to and the plaintiff in *Reed* had allowed the limitations period to expire against the nonparty. Different considerations may obtain

when, as in the case of employers immune under the exclusive-remedy provision of the workers' compensation law or foreign manufacturers not amenable to *in personam* jurisdiction, the plaintiff is legally disabled from joining them as parties. For one thing, the claim-splitting concerns discussed in *Hiatt* do not arise in such cases. As discussed in the Comment to AMI 307, one interpretation of current law would permit allocation of fault to such nonparties for purposes of reducing plaintiff's recovery. If that view were adopted, a court correspondingly might interpret the Arkansas Comparative Fault Act's references to "party or parties from whom the claiming party seeks to recover damages" as excluding from fault-comparison for fifty-percent bar purposes only those nonparties from whom it would have been legally possible for the claiming party to have sought to recover damages.

The second sentence in Interrogatory 7, directing the jury not to reduce its damage award, addresses a different issue. It is intended to offset the risk that the jury might mistakenly reduce the total damages to account for plaintiff's or nonparties' fault (and thus produce a double reduction when the court makes its adjustment). It is also intended to comply with the Arkansas rule prohibiting a trial court, when submitting a case to the jury on interrogatories, from informing the jurors of their answers' effect on the parties' ultimate liability. For discussion of the double-reduction problem, see, e.g., *Schabe v. Hampton Bays Union Free Sch. Dist.*, 103 A.D.2d 418, 430-31, 480 N.Y.S.2d 328, 3336-36 (1984). For exposition and application of the prohibition on what are sometimes called "outcome instructions," see, e.g., *Wright v. Covey*, 233 Ark. 798, 801-02, 349 S.W.2d 344, 346-47 (1961) (holding that instructions, which directed jury to allocate fault between plaintiff and defendant and informed jury that plaintiff's contributory negligence will not bar recovery if less than defendant's fault but will be diminish recovery in proportion to such fault, did not violate rule; reasoning that "rule is not violated if the jury be apprised of a matter they, of necessity, already knew"); *Argo v. Blackshear*, 242 Ark. 817, 819-20, 416 S.W.2d 314, 315-16 (1967) (holding that it was reversible error for trial court, after jury had answered interrogatories by finding equal fault between driver-tortfeasor and pedestrian-victim, to ask jury if they intended for claimants to recover total damages and then, upon receiving an affirmative answer, to resubmit case on general verdict); *Int'l Harvester Co. v. Pike*, 249 Ark. 1026, 1032-34, 466 S.W.2d 901, 905 (1971) (holding that trial court committed reversible error by refusing to grant mistrial after plaintiff's counsel argued to jury that an affirmative response to assumption-of-risk interrogatory would mean plaintiff "will not receive a nickel"; reasoning that rule "is equally applicable to court and counsel"); *Stull v. Ragsdale*, 273 Ark. 277, 283-84, 620 S.W.2d 264, 266 (1981) (upholding trial judge's refusal to allow plaintiff's counsel to argue to jury that assessing damages in response to an interrogatory is not the same as rendering a verdict against defendant for the same amount).

100 In 1991, Arkansas's Comparative Fault Act was amended to provide

that “[i]n cases where the issue of comparative fault is submitted to the jury by an interrogatory, counsel for the parties shall be permitted to argue to the jury the effect of an answer to any interrogatory.” Ark. Code Ann. § 16-64-122(d). In *Campbell v. Entergy Ark., Inc.*, 363 Ark. 132, 137, 211 S.W.3d 500, 504 (2005), the court held that it was reversible error to resubmit a case to the jury on interrogatories, after the jury had deadlocked on a general verdict instruction, without giving plaintiffs counsel an opportunity to argue to the jury the effects of their answers to the interrogatories. (The court declined to reach the question whether subsection 122(d) unconstitutionally infringes the court’s power under Ark. Const. Amend. 80 to prescribe rules of pleading, practice, and procedure for Arkansas courts. *Id.*, 363 Ark. at 139-40, 211 S.W.3d at 506.)

The Arkansas Supreme Court has not yet had occasion to interpret section 16-64-122(d) in light of the Civil Justice Reform Act’s partial abolition of joint and several liability and post-CJRA fault-allocation developments—such as whether the statutory term “cases where the issue of comparative fault is submitted to the jury by interrogatory” includes multi-tortfeasor case in which fault is not alleged against the claiming party but is to be allocated among multiple tortfeasors, some of whom may be nonparties. *Campbell v. Entergy Arkansas, Inc.*, was not decided under the CJRA and there are as yet no other post-CJRA interpretations of section 16-64-122(d). Any bearing that *Rathbun v. Ward*, 315 Ark. 264, 273-74, 866 S.W.2d 403, 408-09 (1993), may have will depend on the interpretation of the term “comparative fault” in light of current law. In that pre-CJRA case, the Arkansas Supreme Court approved the trial court’s interpretation of subsection 122(d) to apply only to comparison of fault “between a claiming party and the party against whom the claiming party seeks to recover,” and hence affirmed the trial court’s refusal to allow any of the attorneys to argue the effect of joint tortfeasor liability and contribution: “we are not persuaded that section 16-64-122(d) allows the concepts and effects of contribution among joint tortfeasors to be argued to the jury.” *Id.* Under Act 1116 of 2013, which amended Arkansas’s Uniform Contribution Among Tortfeasors Act, “allocation of fault as among all joint tortfeasors” is specified as a “right of contribution.” Ark. Code Ann. § 16-61-202(c). A court that combined *Rathbun*’s exclusion of “contribution” from the definition of “comparative fault” under section 16-64-122(d) with Act 1116’s definition of fault-allocation as a “right of contribution” could conclude that subsection 122(d) does not allow counsel to make an “outcome” argument in nonparty-fault cases that do not include an allegation of plaintiff’s fault. On the other hand, as discussed in the Comment to AMI 307, the historical background to Act 1116’s characterization of fault-allocation as a “right of contribution” prominently features a series of post-CJRA court rulings concerning nonparty fault and contribution among severally liable tortfeasors—*Johnson v. Rockwell Automation, Inc.*, 2009 Ark. 241, 308 S.W.3d 135; *ProAssurance Indemnity Co. v. Metheny*, 2012 Ark. 461, 425 S.W.3d 689; *St. Vincent Infirmary Med. Ctr. v. Shelton*, 2013 Ark. 38, 425 S.W.3d 761—none of which involved

section 16-64-122(d). And the terms “comparative fault” and “comparative responsibility” have sometimes been used to refer more generally to proportional liability. *See generally, e.g.,* Stull v. Ragsdale, 273 Ark. 277, 281, 620 S.W.2d 264, 267 (observing that “[t]he purpose of our comparative negligence statute is to distribute the total damages among those who caused them”); Restatement (Third) of Torts: Apportionment of Liability, § § 11, B19 (Topic 2. Liability of Multiple Tortfeasors for Indivisible Harm, Effect of Several Liability) (using term “comparative responsibility” to refer generically to a severally liable person’s portion of an injured person’s liability); 1 Comparative Negligence Manual § 1.1 (3d ed., updated 2014) (defining “comparative negligence” as “a fault concept that apportions liability for damages in proportion to the contribution of each tortfeasor causing the injury or damages”). A court that read section 16-64-122(d)’s term “comparative fault” in light of this more general usage, and the CJRA’s adoption of proportional liability and the subsequent creation of fault-allocation mechanisms by statute and rules of procedure, could conclude that there is a right to “outcome” arguments in nonparty-fault cases that do not include an allegation of plaintiff’s fault.

At least one federal court has ruled that section 16-64-122(d) does not apply in federal diversity cases. *DeWitt v. Smith*, 152 F.R.D. 162, 166-67 (W.D. Ark. 1993) (ruling that section 16-64-122(d) is “procedural,” conflicts with Fed. R. Civ. P. 49 (which is substantially the same as Ark. R. Civ. P. 49) and the general practice in federal courts, and therefore is not binding on federal courts).

CHAPTER 4

INTENTIONAL TORTS AND DEFAMATION

Table of Instructions

AMI

- 401. Issues—Tort of Outrage—Burden of Proof.
- 402. Issues—Claim for Damages Based Upon Deceit—Burden of Proof.
- 403. Issues—Interference with Contractual Relationship or Business Expectancy—Burden of Proof.
- 404. Interference with Contractual Relationship or Business Expectancy—Definition—Impropriety.
- 405. Bad Faith—Definition.
- 406. Reserved.
- 407. Issues—Claim for Damages Based Upon Defamation—Private Figure.
- 408. Issues—Claim for Damages Based Upon Defamation—Public Figure.
- 409. Issues—Claim for Damages Based Upon Defamation—Private Figure—Qualified Privilege.
- 410. Issues—Claim for Damages Based Upon Defamation—Private Figure—Report of Official Proceeding or Public Meeting.
- 411. Definition of Defamatory.
- 412. Definition of Published and Publication.
- 413. Issues—Claim for Damages Based Upon Malicious Prosecution—Burden of Proof.
- 414. Definition—Probable Cause.
- 415. Defense—Malicious Prosecution—Acting Upon the Advice of Counsel.
- 416. Issues—Claim for Damages Based Upon Abuse of Process—Burden of Proof.
- 417. Issues—Claim for Damages Based Upon Assault—Burden of Proof.
- 418. Issues—Claim for Damages Based Upon Battery—Burden of Proof.
- 419. Issues—Claim for Actual Damages Based Upon Intentional Tort—Burden of Proof.
- 420. Issues—Claim for Damages Based Upon Invasion of Privacy by Intrusion Upon Seclusion.
- 421. Issues—Claim for Damages Based Upon Invasion of Privacy by Appropriation.
- 422. Issues—Claim for Damages Based Upon Invasion of Privacy by Public Disclosure of Private Facts.
- 423. Issues—Claim for Damages Based Upon False Light Invasion of Privacy.
- 424. Defense—Invasion of Privacy—Consent.

AMI

425.

Issues—Claim for Damages Based Upon Conversion of Personal Property.

AMI 401

ISSUES—TORT OF OUTRAGE—BURDEN OF PROOF

_____ claims damages from _____, and has the
(Plaintiff) (defendant)
burden of proving each of the following three essential propositions:

First, that *[he][she]* has sustained damages;

Second, that _____ willfully and wantonly
(defendant)
engaged in extreme and outrageous conduct;

And third, that such conduct proximately caused damage to _____ in the nature of emotional distress
(plaintiff)
[and bodily harm].

[If you find from the evidence in this case that each of these propositions has been proved, then your verdict should be for _____; but if, on the other
(plaintiff)
hand, you find that any of these propositions has not been proved, then your verdict should be for _____.]
(defendant)

A person acts willfully and wantonly when *[he][she]* knows or should know in the light of surrounding circumstances that *[his][her]* conduct will naturally and probably result in emotional distress [and bodily harm] and continues such conduct in reckless disregard of the consequences.

By extreme and outrageous conduct, I mean conduct that is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society.

Emotional distress must be reasonable and justified under the circumstances and must be so severe that no reasonable person could be expected to endure it.

NOTE ON USE

If bodily harm is claimed because of defendant's conduct, the appropriate damage instructions should be selected from AMI 2202 through 2209 and inserted in the format of AMI 2201.

Do not use the bracketed paragraph when the case is submitted on interrogatories.

COMMENT

This tort was recognized in *M. B. M. Co., Inc. v. Counce*, 268 Ark. 269, 596 S.W.2d 681 (1980). Liability can only be established by clear-cut proof, *Givens v. Hixson*, 275 Ark. 370, 631 S.W.2d 263 (1982), which means preponderance of the evidence, *McQuay v. Guntharp*, 331 Ark. 466, 963 S.W.2d 583 (1998). There must be willful and wanton wrongdoing on the part of the tortfeasor. *Dalrymple v. Fields*, 276 Ark. 185, 633 S.W.2d 362 (1982). Arkansas does not recognize a tort of negligent infliction of emotional distress, even where the perpetrator is incompetent. *Dowty v. Riggs*, 2010 Ark. 465.

Recovery under this theory was upheld in *Growth Properties I v. Cannon*, 282 Ark. 472, 669 S.W.2d 447 (1984), where a construction company desecrated a family gravesite; in *Hess v. Treece*, 286 Ark. 434, 693 S.W. 2d 792 (1985), cert. denied, 475 U.S. 1036, 106 S. Ct. 1245, 89 L. Ed.2d 354 (1986), where defendant, motivated by personal animosity, carried on a two-year campaign to cause plaintiff's discharge as a police officer by having plaintiff watched, and by filing false reports with plaintiff's supervisors; and in *Deitsch v. Tillery*, 309 Ark. 401, 833 S.W. 2d 760 (1992), where there was intentional concealment of asbestos exposure in a school, and the immunity statute was held to be inapplicable to this intentional tort. *See also Tandy Corp. v. Bone*, 283 Ark. 399, 678 S.W.2d 312 (1984).

An action for outrage is particularly appropriate when there has

been a violation of a trusted relationship and the damages arise from the position and occupation of the actor. *Rees v. Smith*, 2009 Ark. 169, 301 S.W.3d 467 (outrage claim lies against attorney who makes continued representation of a client conditional upon the client engaging in sex with the attorney). *See also* *McQuay v. Guntharp*, 331 Ark. 466, 963 S.W.2d 583 (1998) (outrage claim lies against physician who fondles female patients).

Conduct consisting of “mere insults, indignities, threats, annoyances, petty oppression, or other trivialities” will not subject a defendant to liability for outrage. Whether conduct is extreme and outrageous must be determined on a case-by-case basis. *Shepherd v. Washington County*, 331 Ark. 480, 962 S.W.2d 779 (1998); *Ingram v. Pirelli Cable Corp.*, 295 Ark. 154, 747 S.W.2d 103 (1988); *Sterling Drug, Inc. v. Oxford*, 294 Ark. 239, 743 S.W.2d 380 (1988).

In *Ross v. Patterson*, 307 Ark. 68, 817 S.W.2d 418 (1991), a sharply divided court reversed an award of damages for alleged outrage. Finding no “substantial evidence” to support the verdict below, the court majority stated that it required “clear-cut proof” of the tort. The dissenting justices concluded that there was “substantial evidence” of outrage sufficient to sustain the verdict. This decision suggests that damage awards for outrage may be subject to a de novo standard of appellate review. *See also* *Calvary Christian School, Inc. v. Huffstuttlar*, 367 Ark. 117, 238 S.W.3d 58 (2006) (decision requiring that the actual occurrence of conduct which “could have been outrageous if it had occurred” be established by proof rather than “attenuated inferences”).

The court reversed an award of damages for outrage in *Kiersey v. Jeffrey*, 369 Ark. 220, 253 S.W.3d 438 (2007), a custody dispute in which defendant kept the child at some friends’ house for several days, on the ground that there was no “clear-cut proof” that plaintiffs suffered severe emotional distress. After reviewing Arkansas cases on this element, the court found the child’s embarrassment and brief decline in his school performance, and his mother’s “upset” feelings (particularly in view of her failure to seek medical or psychological treatment), insufficient to support the jury’s verdict. *See also* *FMC Corp., Inc. v. Helton*, 360 Ark. 465, 202 S.W.3d 490 (2005) (affirming directed verdict on outrage claim; evidence that plaintiffs were unable to sleep, suffered anxiety, lost weight, took antidepressants, and felt “devastated” held insufficient); *Schmidt v. Stearman*, 98 Ark. App. 167, 253 S.W.3d 35 (2007) (affirming directed verdict on outrage claim on basis that evidence of feelings of depression treated by antidepressant medication and fear of returning to home after defendant allegedly ransacked plaintiff’s home and shot his dogs was insufficient to state a claim).

The court takes a narrow view of the tort of outrage in the context of employment relationships. *Hollomon v. Keadle*, 326 Ark. 168, 931 S.W.2d 413 (1996); *City of Green Forest v. Morse*, 316 Ark. 540, 873 S.W.2d 155 (1994) (extensive historical analysis of tort of outrage); *Cesena v. Gray*, 2009 Ark. App. 143 (threats of supervisors to cause im-

minent physical harm during working hours insufficient to support outrage claim).

Research References

West's Key Number Digest

Damages ⇨ 216(10)

Legal Encyclopedias

C.J.S., Damages §§ 426 to 427, 434 to 442

AMI 402

ISSUES—CLAIM FOR DAMAGES BASED UPON
DECEIT—BURDEN OF PROOF

 claims damages from for deceit and
(Plaintiff) (defendant)
has the burden of proving each of the following five
essential propositions:

First, that *[he][she]* has sustained damages;

Second, that a false representation of a material
fact was made by ;
(defendant)

Third, that *[either] [knew or believed that*
(defendant)
the representation was false], [or] [(he)(she) knew or
believed that (he)(she) did not have a sufficient basis
of information to make the representation]

Fourth, that intended to induce *[to*
(defendant) (plaintiff)
act] [or] [to refrain from acting] in reliance upon the
misrepresentation; and

Fifth, that justifiably relied upon the repre-
(plaintiff)
sentation in *[acting] [or] [refraining from acting]* and
as a result sustained damages.

A fact or statement of fact is material if it was a
substantial factor in influencing 's decision. It is
(plaintiff)
not necessary, however, that it be the paramount or
decisive factor, but only one that a reasonable person
would attach importance to in making a decision.

[If you find from the evidence in this case that
each of these propositions has been proved, then
your verdict should be for (against the party or
(plaintiff)

parties who made the false representation); but if, on the other hand, you find from the evidence that any of these propositions has not been proved, then your verdict should be for _____.]

(defendant)

NOTE ON USE

Do not use the bracketed paragraph when the case is submitted on interrogatories.

COMMENT

This instruction was approved in *McClard v. Crain Mgmt. Group, Inc.*, 313 Ark. 472, 855 S.W.2d 929 (1993).

The elements of the tort of deceit were reiterated in *Fidelity Mortgage Co. of Texas v. Cook*, 307 Ark. 496, 821 S.W.2d 39 (1991), and *Baskin v. Collins*, 305 Ark. 137, 806 S.W.2d 3 (1991). *See also* *Nicholson v. Century 21, Ivy Realty, Inc.*, 307 Ark. 161, 818 S.W.2d 254 (1991); *Brookside Village Mobile Homes v. Meyers*, 301 Ark. 139, 782 S.W.2d 365 (1990).

Ordinary care does not require a buyer to test the truth of a seller's representations where they are within the knowledge of the seller, and made to induce the buyer to refrain from seeking further information. *Lancaster v. Schilling Motors, Inc.*, 299 Ark. 365, 772 S.W.2d 349 (1989). *See also* *Yazdianpour v. Safeblood Technologies, Inc.*, 779 F.3d 530, 536 (8th Cir. 2015) (reviewing Arkansas cases on duty to investigate the representation).

There is no duty to disclose the existence of a governmental regulation, where both parties have equal access to the knowledge. *Baskin, supra*. *See* RESTATEMENT (SECOND) OF TORTS § 551 (1976) for a discussion of occasions when a duty to disclose arises in a business transaction.

In the context of negotiating a contract, misrepresentation must relate to a past event, or a present circumstance, but not to a future event. An assertion limited to a future event may be merely a prediction, or it may be a promise that imposes liability for breach of contract, but it is not a misrepresentation as to that event. *P.A.M. Transport, Inc. v. Arkansas Blue Cross and Blue Shield*, 315 Ark. 234, 868 S.W.2d 33 (1993). On the other hand, when a misrepresentation involves a promise to act in the future, failure to perform the act may be actionable if the promisee can prove that, at the time the promise was made, the promisor had no intent to perform. *Undem v. First Nat. Bank, Springdale, Ark.*, 46 Ark. App. 158, 879 S.W.2d 451 (1994).

The representation must be material. *Nicholson v. Simmons First*

Nat. Corp., 312 Ark. 291, 849 S.W.2d 483 (1993). Materiality is a question of fact. *Ellis v. Liter*, 311 Ark. 35, 37, 841 S.W.2d 155, 156 (1992).

The third element has been structurally modified to make clear that the "knew or believed" requirement is applicable to the phrase "did not have a sufficient basis of information to make it." See *Scollard v. Scollard*, 329 Ark. 83, 947 S.W.2d 345 (1997).

An attempt to overturn or contradict the terms of a written instrument requires satisfaction of the higher burden of proof by clear and convincing evidence. *Beatty v. Haggard*, 87 Ark. App. 75, 184 S.W.3d 479 (2004).

Silence when there is a duty to speak can constitute fraud. In *Holiday Inn Franchising, Inc. v. Hotel Assocs., Inc.*, 2011 Ark. App. 147, at 12, 382 S.W.3d 6, 14, the Court of Appeals said:

Generally, a mere failure to volunteer information does not constitute fraud. *Farm Bureau Policy Holders v. Farm Bureau Mut. Ins. Co.*, Ark. 285, 302, 984 S.W.2d 6, 14–15 (1998). But silence can amount to actionable fraud in some circumstances where the parties have a relation of trust or confidence, where there is inequality of condition and knowledge, or where there are other attendant circumstances. *Id.* The duty to disclose is not limited to confidential or fiduciary relationships, as *Holiday Inn* suggests. See *Camp v. First Fed. Savings & Loan*, Ark.App. 150, 154, 671 S.W.2d 213, 216 (1984). There may be a special relationship or special circumstances requiring disclosure. *Id.* In determining whether such special relationships or circumstances exist, the events surrounding the parties' transaction may be considered. *Lambert v. Firststar Bank*, 83 Ark.App. 259, 265, 127 S.W.3d 523, 527–28 (2003). . . . A duty of disclosure may exist where information is peculiarly within the knowledge of one party and is of such a nature that the other party is justified in assuming its nonexistence. *Bridges v. United Savings Ass'n*, 246 Ark. 221, 228, 438 S.W.2d 303, 306 (1969); see also *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. First Nat'l Bank of Little Rock*, 774 F.2d 909, 913–14 (8th Cir. 1985).

Such a duty to disclose information material to the renewal of a long term franchise relationship characterized by honesty, trust, and the free flow of information was found in *Holiday Inn Franchising, Inc.*, *supra*, where the franchisee had spent a substantial amount of money on improvements in anticipation of the franchise renewal and had been assured by a representative of the franchisor that the franchise would be renewed if the franchise was operated properly.

In fraud cases, the remedies of rescission and damages are available, and various measures of damages have been applied: (1) benefit of the bargain, (2) out-of-pocket, (3) cost of repair, (4) consequential, and (5) punitive. *Smith v. Walt Bennett Ford, Inc.*, 314 Ark. 591, 601–603,

864 S.W.2d 817, 823–824 (1993); *see also* Howard W. Brill, *Arkansas Law of Damages* § 33.8 (5th ed. 2013). It may be appropriate to prepare an instruction with the measure(s) of damage being sought in the case.

In *Wallis v. Ford Motor Co.*, 362 Ark. 317, 208 S.W.3d 153 (2005), the Arkansas Supreme Court affirmed the dismissal of the fraud claim, holding that a claim for an allegedly defective vehicle was insufficient where the only injury alleged was the “diminution in value” of the vehicle. *Wallis* is discussed in greater detail in the Comment to AMI 2900.

A plaintiff alleging deceit may proceed to trial seeking the inconsistent remedies of rescission of the fraudulent contract and damages based on the fraudulent contract. *Marx Real Estate Invests., LLC v. Coloso*, 2011 Ark. App. 426, at 9 (fraud alleged in the sale of a house). The plaintiff must elect between the inconsistent remedies before the jury is instructed. *Id.* at 10 (the jury was empanelled, heard evidence through the close of the plaintiffs’ case, and then after the plaintiffs’ election of the equitable remedy of rescission was discharged). If the plaintiff elects the equitable remedy of rescission but the court refuses to rescind the contract based on the evidence, the court may nevertheless award damages to the plaintiff under the equitable clean-up doctrine. *Id.* at 10–11.

Research References

West’s Key Number Digest

Fraud ⇨65

AMI 403

**ISSUES—INTERFERENCE WITH CONTRACTUAL
RELATIONSHIP OR BUSINESS EXPECTANCY—
BURDEN OF PROOF**

 claims damages from and has the
(Plaintiff) (defendant)
burden of proving each of the following five essential
propositions:

First, that *[he][she][it]* sustained damages;

Second, that had a *[valid contractual rela-*
(plaintiff)
tionship] [and] [or] [business expectancy];

Third, that had knowledge of the *[contrac-*
(defendant)
tual relationship] [and] [or] [business expectancy];

Fourth, that by intentional and improper interfer-
ence induced or caused a disruption or
(defendant)
termination of the *[contractual relationship] [and] [or]*
[business expectancy] and;

Fifth, that the disruption or termination was a
proximate cause of 's damages.
(plaintiff)

[As a defense to the claim of ,
(plaintiff) (defendant)
contends that *[his][her][its]* conduct was privileged
because *[he][she][it]* had *(an interest in) (a duty to)*
the *(person) (business)* with which the contends
(plaintiff)
that *[he][she][it]* had a *(contractual relationship) (and)*
or (business expectancy). As to this defense,
(defendant)
has the burden of proving each of three essential
propositions:

First, that *[he][she][it]* had (an interest in) (a duty to) this (person) (business);

Second, that *[he][she][it]* acted in furtherance of that (interest) (duty); and

Third, that *[he][she][it]* acted without bad faith.]

When I use the phrase “bad faith,” I mean conduct that is dishonest, oppressive, or carried out with a state of mind characterized by hatred, ill will, or a spirit of revenge.]

[If you find from the evidence in this case that _____ has proved each of the five propositions essential to *[his][her][its]* claim and that _____ has

failed to prove one or more of the propositions essential to *[his][her][its]* defense of privilege, then your verdict should be for _____; but if, on the other hand,

you find from the evidence that any of the five propositions has not been proved by _____ or that _____

has proved each of the three propositions essential to *[his][her][its]* defense of privilege, then your verdict should be for _____.]

NOTE ON USE

When this instruction is used, AMI 404 should be also given.

Do not use the final bracketed paragraph if the case is submitted on interrogatories.

Use the first bracketed paragraph only when the defense of privilege is asserted. When other affirmative defenses are asserted, this instruction should be modified accordingly.

COMMENT

For the elements of this tort, see *Baptist Health v. Murphy*, 2010 Ark. 358, at 15, 373 S.W.3d 269, 281–82; *Mid–South Beverages, Inc. v. Forrest City Grocery Co., Inc.*, 300 Ark. 204, 205, 778 S.W.2d 218, 219 (1989); *Jim Orr and Assocs., Inc. v. Waters*, 299 Ark. 526, 531, 773 S.W.2d 99, 102 (1989); *Walt Bennett Ford, Inc. v. Pulaski Cnty. Special Sch. Dist.*, 274 Ark. 208, 214, 624 S.W.2d 426, 429 (1981); *Mason v. Funderburk*, 247 Ark. 521, 527, 446 S.W.2d 543, 547 (1969); RESTATEMENT (SECOND) OF TORTS §§ 766, 766B (1965). The formulation of bad faith in Arkansas is affirmative misconduct that is “dishonest, malicious, or oppressive.” *Stevenson v. Union Standard Ins. Co.*, 294 Ark. 651, 654, 746 S.W.2d 39, 41 (1988) (quoting *Aetna Cas. & Sur. Co. v. Broadway Arms Corp.*, 281 Ark. 128, 133, 664 S.W.2d 463, 465 (1983)). Furthermore, “in an action for this type of tort, actual malice is that state of mind under which a person’s conduct is characterized by hatred, ill will or a spirit of revenge.” *Id.* at 654, 746 S.W.2d at 41. See also *Conway Corp. v. Constr. Eng’rs, Inc.*, 300 Ark. 225, 231–32, 782 S.W.2d 36, 39 (1989) (citing *Stevenson*, 294 Ark. 651, 746 S.W.2d 39, for the definition of bad faith in a case involving a claim of interference with contractual expectancy). As a stylistic matter in the 2013 edition, the Committee removed the term “malicious” from the instruction and retained its definition.

This tort requires the involvement of a third party. *Faulkner v. Ark. Children’s Hosp.*, 347 Ark. 941, 959, 69 S.W.3d 393, 405 (2002). The tort is “based upon on a defendant’s conduct toward a third party.” *Navorro-Monzo v. Hughes*, 297 Ark. 444, 447, 763 S.W.2d 635, 636 (1989). Thus, a defendant’s breach of his own contract with the plaintiff is not actionable. “A party to a contract and its employees and agents, acting within the scope of their authority, cannot be held liable for interfering with the party’s own contract.” *Faulkner*, 347 Ark. at 959, 69 S.W.3d at 405. See also *St. Joseph’s Reg’l Health Ctr. v. Munos*, 326 Ark. 605, 614, 934 S.W.2d 192, 196 (1996) (holding that Fale, the individual defendant, could not be liable for tortiously influencing the termination of Munos’s management contract with a partnership in which Munos and St. Joseph’s were both partners; although employed by a separate entity, Fale acted as St. Joseph’s agent in the area of partnership affairs and with respect to such actions stood in the shoes of St. Joseph’s, a party to the contract); *Palmer v. Ark. Council on Econ. Educ.*, 344 Ark. 461, 473, 40 S.W.3d 784, 791 (2001) (holding that human resources consultant hired by employer was “an agent acting at the request of and on behalf of” the employer and could not be liable for tortious interference).

No contractual relationship need exist to maintain an action for tortious interference; the second proposition of this instruction “may be proved by demonstrating either a valid contractual relationship or a business expectancy.” *Cross v. Ark. Livestock & Poultry Comm’n*, 328 Ark. 255, 261–62, 943 S.W.2d 230, 233–34 (1997). The business expectancy or contractual relationship must be specified in the pleadings,

Country Corner Food & Drug, Inc. v. First State Bank & Trust Co. of Conway, Ark., 332 Ark. 645, 653–54, 966 S.W.2d 894, 898 (1998), as must the facts supporting its existence, *Hunt v. Riley*, 322 Ark. 453, 458–59, 909 S.W.2d 329, 332 (1995). For an extensive consideration of the “business expectancy” element, see *Stewart Title Guar. Co. v. American Abstract & Title Co.*, 363 Ark. 530, 215 S.W.3d 596 (2005).

The court has held, in the context of real estate transactions, that a tortious interference claim will not lie for an expectancy subject to a contingency, the maturity of which causes the loss of the expectancy. *Windsong Enterprises, Inc. v. Upton*, 366 Ark. 23, 28, 233 S.W.3d 145, 150 (2006) (expectancy of real estate development was subject to the contingency of a possible amendment to provisions of subdivision’s Bill of Assurance and Dedication); *Donathan v. McDill*, 304 Ark. 242, 244, 800 S.W.2d 433, 434 (1990) (owner’s timely exercise of right of redemption was a contingency that prevented the plaintiff from acquiring property). *Donathan*, *supra*, was distinguished in *Benny M. Estes and Associates, Inc. v. Time Ins. Co.*, 980 F.2d 1228 (8th Cir. 1992), where the court held that the termination of an employment relationship by at-will sub-agents was controlled by *Mason v. Funderburk*, *supra*, not *Donathan*. More recently, the Arkansas Court of Appeals, citing *Wind-song Enterprises, Inc.*, *supra*, has extended the subject-to-contingency doctrine beyond the real estate transaction context to include the possibility that the party with whom the plaintiff claims to expect to do business will choose instead not to do business with the plaintiff. See *Mercy Health Sys. of Nw. Ark., Inc. v. Bicak*, 2011 Ark. App. 341, at 12–13, 383 S.W.3d 869, 876 (ruling that Mercy Health System’s business expectancy with its patients “was subject to a contingency—that its patients might [or might not] return to it for health care in the future”); see also *Deck House, Inc. v. Link*, 98 Ark. App. 17, 29, 249 S.W.3d 817, 827–28 (2007) (ruling as an alternative ground for decision that because the plaintiff home designer’s contract with the purchasers “contemplate[d] the possibility that the [purchasers] would elect to not purchase [the designer’s] package,” the contingent nature of the expectancy defeated plaintiff’s claim). But see *Baptist Health v. Murphy*, 365 Ark. 115, 124, 226 S.W.3d 800, 808–09 (2006) (affirming preliminary injunction against Baptist Health’s non-competition policy on physicians’ claim that the policy would tortiously interfere with doctor-patient relationships).

To satisfy the element of causation, the court has said there must be proof that a third person either failed to continue or refused to enter into a contractual relationship with the claiming party as a result of the defendant’s unauthorized conduct. *Navorro-Monzo*, 297 Ark. at 447, 763 S.W.2d at 636. However, the court has also affirmed liability when the defendant’s unlawful conduct prevented the claiming party from performing his contractual obligations owed to a third party. *United Bilt Homes, Inc. v. Sampson*, 310 Ark. 47, 52–53, 832 S.W.2d 502, 504 (1992) (holding that United Bilt, mortgagee and loss payee, was liable for tortious interference to Sampson, the insured mortgagor; the tortious conduct was United Bilt’s refusal to release insurance proceeds

which caused Sampson to default on his contract with the third party hired to repair his home following a fire loss). The *United Bilt* court quoted with approval W. Page Keeton, Prosser and Keeton on Torts, § 129 at p. 991 (5th ed. 1984), which states that provided the interference causes harm and was unjustified, “no actual repudiation of contract is necessary for liability, and it is enough that the contract performance is partly or wholly prevented, or made less valuable, or more burdensome by the defendant’s unjustified conduct.” *United Bilt*, 310 Ark. at 52, 832 S.W.2d at 504.

In order to be actionable, the interference must be improper. *Mason v. Wal-Mart Stores, Inc.*, 333 Ark. 3, 969 S.W.2d 160 (1998). See AMI 404.

The defendant may assert an affirmative defense of privilege. Arkansas courts recognize a privilege to compete. See *Kinco, Inc. v. Schueck Steel, Inc.*, 283 Ark. 72, 77–78, 671 S.W.2d 178, 181–82 (1984) (citing W. Prosser, Law of Torts, § 130 (3rd ed. 1971) and Restatement (Second) of Torts, § 768); see also *Office Machs., Inc. v. Mitchell*, 95 Ark. App. 128, 234 S.W.3d 906 (2006) (privilege to compete); *Conway Corporation v. Construction Engineers, Inc.*, 300 Ark. 225, 782 S.W.2d 36 (1989) (discussing the privilege of acting without bad faith to protect the public interest or a third person to whom the defendant has a relationship of responsibility). For a discussion of other potential privileges or justifications for conduct alleged to be improper, see Restatement (Second) of Torts §§ 768 to 773 (1965) and Prosser, *supra*, pp. 985–989.

In *Quality Petroleum, Inc. v. Windward Petroleum, Inc.*, 2011 Ark. App. 116, at 7–8, 378 S.W.3d 818, 822–23, the court held that an accord and satisfaction on the underlying contract does not extinguish an independent claim for tortious interference.

Research References

West’s Key Number Digest
Torts ⇨280 to 286

AMI 404

**INTERFERENCE WITH CONTRACTUAL
RELATIONSHIP OR BUSINESS
EXPECTANCY—DEFINITION—IMPROPRIETY**

 contends that 's conduct was
(Plaintiff) (defendant)
improper because [describe succinctly the nature of
conduct at issue]. In determining whether has
(plaintiff)
met [*his*][*her*][*its*] burden to prove the conduct was
improper, you may consider the following factors:

- (a) the nature of the conduct;
- (b) the 's motive;
(defendant)
- (c) the interest of with which the conduct
(plaintiff)
interfered;
- (d) the interest sought to be advanced by
 ;
(defendant)
- (e) the social interests in protecting the freedom
of action of and the contractual interests of
(defendant)
 ;
(plaintiff)
- (f) the proximity or remoteness of the 's
(defendant)
conduct to the interference; and
- (g) the relations between the parties.

NOTE ON USE

Use this instruction when AMI 403 is given.

COMMENT

The Committee recognizes the difficulty in defining the term “improper.” This instruction states the only standard identified in the case requiring the inclusion of “improper” as an essential element of the cause of action, *Mason v. Wal-Mart Stores, Inc.*, 333 Ark. 3, 14, 969 S.W.2d 160, 165 (1998), which quoted with approval RESTATEMENT (SECOND) OF TORTS § 767 (1977). For a discussion of specific applications of the factors set out in § 767, see Restatement (Second) of Torts §§ 768 to 773 (1965).

The Comment to this section of the Restatement characterizes the nature of the tortfeasor’s conduct as involving the threats of physical violence, fraudulent misrepresentation, threat of wrongful prosecution (civil or criminal), conduct independently unlawful, offensive economic pressure, or violation of recognized ethical codes or established business customs. In *Baptist Health v. Murphy*, 2010 Ark. 358, at 15–16, 373 S.W.3d 269, 282, the court added consideration of the social interests in protecting the contractual interests of the plaintiff as the fifth factor to be considered in determining whether the interference was improper. See also *Fisher v. Jones*, 311 Ark. 450, 459, 844 S.W.2d 954, 959 (1993) (quoting favorably Restatement (Second) of Torts § 769, regarding the effect of the actor’s financial interest in the business of the person induced).

In *K.C. Props. of N.W. Ark., Inc. v. Lowell Inv. Partners, LLC*, 373 Ark. 14, 280 S.W.3d 1 (2008), summary judgment was affirmed on this claim because the facts relied on did not establish that any interference was improper. In *Murphy*, 2010 Ark. 358, at 25–27, 373 S.W.3d at 286–87, the Court affirmed as not clearly erroneous the trial court’s finding that the interference was improper based on its analysis of these factors.

Research References

West’s Key Number Digest
Torts ⇨ 280 to 286

AMI 405

RESERVED

In the 2013 edition, the definition of bad faith that was formerly in this instruction was moved to AMI 403—the issue instruction for interference with contractual relationship or business expectancy.

AMI 406

RESERVED

AMI 407

ISSUES—CLAIM FOR DAMAGES BASED UPON
DEFAMATION—PRIVATE FIGURE

 claims damages from for defama-
(Plaintiff) (defendant)
tion and has the burden of proving each of the follow-
ing five essential propositions:

First, that *[he][she]* sustained damages;

Second, that published a false statement
(defendant)
of fact concerning ;
(plaintiff)

Third, that the statement of fact was defamatory;

Fourth, that acted *[with negligence in fail-*
(defendant)
ing to determine the truth of the statement prior to its
publication] [or] [with knowledge the statement was
false]; and

Fifth, that the publication of the statement was a
proximate cause of 's damages.
(plaintiff)

[If you find from the evidence in this case that
each of these propositions has been proved, then
your verdict should be for *; but if, on the other*
(plaintiff)
hand, you find from the evidence that any of these
propositions has not been proved, then your verdict
should be for *.]*
(defendant)

NOTE ON USE

Do not use the bracketed paragraph when an affirmative defense, such as privilege, is in issue, or when the case is submitted on interrogatories.

In an action based on negligence, use AMI 302 in addition to this instruction.

Where the defense of qualified privilege is in issue, AMI 409 should be given, rather than this instruction.

Use AMI 411 and 412 when this instruction is given.

COMMENT

This instruction was noted in *Wal-Mart Stores, Inc. v. Lee*, 348 Ark. 707, 74 S.W.3d 634 (2002) and was cited as authority in *Calvary Christian School, Inc. v. Huffstuttler*, 367 Ark. 117, 238 S.W.3d 58 (2006).

Gertz v. Robert Welch, Inc., 418 U.S. 323, 347, 94 S. Ct. 2997, 3011, 41 L. Ed. 2d 789 (1974), held that the states are free to decide the appropriate level of fault for recovery by private figure plaintiffs in defamation actions, as long as liability without fault is not established. The Court determined that the United States Constitution demanded a minimum requirement of negligence. Arkansas has chosen this "low option." In *Dodrill v. Arkansas Democrat Co.*, 265 Ark. 628, 590 S.W.2d 840 (1979), cert. denied, 444 U.S. 1076, 100 S. Ct. 1024, 62 L. Ed. 2d 759 (1980), the Arkansas Supreme Court held that a publisher of a libelous article is liable to a private figure for failing to use ordinary care prior to publication.

In *Little Rock Newspapers, Inc. v. Dodrill*, 281 Ark. 25, 28, 660 S.W.2d 933, 935 (1983), the court stated that "[I]t is settled law that damage to reputation is the essence of libel and protection of the reputation is the fundamental concept of the law of defamation. The action turns on whether the communication or publication tends or is reasonably calculated to cause harm to another's reputation."

United Ins. Co. of America v. Murphy, 331 Ark. 364, 961 S.W.2d 752 (1998), abolished the doctrine of presumed damages in defamation per se cases and announced that, prospectively, a plaintiff in a defamation case must prove reputational injury in order to recover damages.

Although plaintiff must prove actual harm to reputation, the showing required is slight—only that the defamatory statement detrimentally affected plaintiff's relations with others. The law does not require proof of actual out-of-pocket losses. *See Northport Health Services, Inc. v. Owens*, 356 Ark. 630, 158 S.W.3d 164 (2004); *Ellis v. Price*, 337 Ark. 542, 990 S.W.2d 543 (1999).

See generally Lisa R. Pruitt, Comment, Law of Defamation: An Arkansas Primer, 42 Ark. L. Rev. 915 (1989).

Research References

West's Key Number Digest
 Libel and Slander ⇨124

AMI 408

**ISSUES—CLAIM FOR DAMAGES BASED UPON
DEFAMATION—PUBLIC FIGURE**

 claims damages from for defama-
(Plaintiff) (defendant)
tion and has the burden of proving each of the follow-
ing five essential propositions:

First, that *[he]/[she]* sustained damages;

Second, that published a false statement
(defendant)
of fact concerning ;
(plaintiff)

Third, that the statement of fact was defamatory;

Fourth, that the publication of the statement was
a proximate cause of 's damages.
(plaintiff)

 must prove these first four propositions by
(Plaintiff)
a preponderance of the evidence. I have defined the
term "preponderance of the evidence" in a separate
instruction.

Fifth, the burden is also on to prove by
(plaintiff)
clear and convincing evidence that published
(defendant)
the defamatory fact, knowing it was false or with a
high degree of awareness of its probable falsity.
"Clear and convincing evidence" is proof that enables
you without hesitation to reach a firm conviction that
the allegation is true.

[If you find from the evidence in this case that
each of these propositions has been proved, then
your verdict should be for ; but if, on the other
(plaintiff)

hand, you find from the evidence that any of these propositions has not been proved, then your verdict should be for _____.]
(defendant)

NOTE ON USE

Do not use the final bracketed paragraph when the case is submitted on interrogatories.

Use AMI 411 and 412 when this instruction is given.

AMI 202 should precede this instruction.

COMMENT

Whether a defendant is a public figure is a mixed question of law and fact to be resolved by the court. *Southall v. Little Rock Newspapers, Inc.*, 332 Ark. 123, 964 S.W.2d 187 (1998); *Little Rock Newspapers, Inc. v. Fitzhugh*, 330 Ark. 561, 579, 954 S.W.2d 914, 924 (1997), *cert. denied*, 523 U.S. 1095, 118 S.Ct. 1563, 140 L.Ed.2d 794 (1998); *Thomson Newspaper Publishing, Inc. v. Coody*, 320 Ark. 455, 896 S.W.2d 897 (1995), *cert. denied*, 516 U.S. 1008, 116 S.Ct. 563, 133 L.Ed.2d 489 (1995); *Cornett v. Prather*, 293 Ark. 108, 110, 737 S.W.2d 159, 160 (1987).

The definition of “clear and convincing evidence” in this instruction is a combination of two different formulations that have been recited by the Arkansas Supreme Court. In a number of cases and a variety of contexts, the court has stated the definition as “proof that produces a firm conviction in you that the allegation is true.” *See, Carter v. Four Seasons Funding Corp.*, 351 Ark. 637, 653, 97 S.W.3d 387, 395 (2003) (usury claim); *Ward v. Williams*, 354 Ark. 168, 118 S.W.3d 513, 521 (2003) (oral contract for sale of land); *Howell v. Scroll Technologies*, 343 Ark. 297, 304, 35 S.W.3d 800, 805 (2001) (workers’ compensation); *Baker v. Arkansas Dept. of Human Services*, 340 Ark. 42, 48, 8 S.W.3d 499, 503 (2000) (termination of parental rights). The court does not, however, appear to intend this definition to mean something different than other language it has recited (“proof so clear, direct, weighty, and convincing as to enable you to come to a clear conviction of the matter asserted”) and in fact has sometimes included both formulations in the same opinion. *See, e.g., Howell, supra*; *Kelly v. Kelly*, 264 Ark. 865, 870, 575 S.W.2d 672, 675–676 (1979). The Committee combined language from both into a hybrid definition that appears to capture the essence of the principle.

Research References

West’s Key Number Digest
Libel and Slander ⇨124

AMI 409

ISSUES—CLAIM FOR DAMAGES BASED UPON DEFAMATION—PRIVATE FIGURE—QUALIFIED PRIVILEGE

 claims damages from **for defama-**
(Plaintiff) (defendant)
tion and has the burden of proving each of the follow-
ing five essential propositions defining defamation:

First, that [he]/[she] sustained damages;

Second, that **published a false statement**
(defendant)
of fact concerning **;**
(plaintiff)

Third, that the statement of fact was defamatory;

Fourth, that **acted [with negligence in fail-**
(defendant)
ing to determine the truth of the statement prior to its
publication] [or] [with knowledge the statement was
false]; and

Fifth, that the publication of the statement was a
proximate cause of **'s damages.**
(plaintiff)

In addition to these essential propositions, there
is an additional proposition **must prove.**
(plaintiff)

The statement **claims** **published**
(plaintiff) (defendant)
was in connection with a [proceeding] [transaction]
[relationship] in which **had [an interest] [a**
(defendant)
duty to communicate with the person(s) to whom the
statement was published] and, therefore, was pub-
lished within a privilege for which **is not liable,**
(defendant)

unless the publication exceeds the scope of the privilege. Plaintiff contends that the publication exceeded the scope of the privilege and has the burden of proving *[any one of]* the following proposition[s]:

(a) *[That the statement was not reasonably related to the subject matter of the (proceeding) (transaction) (relationship)]; [or]*

(b) *[That the statement was not made for the purpose of furthering _____'s interest in the (proceeding) (transaction) (relationship)]; [or]*
(defendant)

(c) *[That the (content of the statement) (and) (extent to which the statement was published) was more than necessary to (further _____'s interest in) (discharge _____'s duty with respect to) the (proceeding) (transaction) (relationship)]; [or]*
(defendant)

(d) *[That _____, in publishing the statement, acted out of hatred, ill will, or a spirit of revenge]; [or]*
(defendant)

(e) *[That _____ published the statement with a lack of belief in its truthfulness].*
(defendant)

[If you find from the evidence in this case that each of the five essential propositions defining defamation has been proved and that *(any one of)* the proposition(s) necessary to overcome the privilege has been proved, then your verdict should be for _____; but if, on the other hand, you find from the ev-
(plaintiff)

idence that any of the five essential elements defining defamation or that *(one of these propositions) (this proposition)* has not been proved, then your verdict

should be for _____.]
(defendant)

NOTE ON USE

This instruction should be used where the court finds the defense of qualified privilege is applicable.

In an action based upon negligence, use AMI 302 in addition to this instruction.

Use AMI 411 and 412 when this instruction is given.

Do not use the final bracketed paragraph when the case is submitted on interrogatories.

COMMENT

The elements of qualified privilege are set forth in *Dillard Dept. Stores, Inc. v. Felton*, 276 Ark. 304, 307, 634 S.W.2d 135, 136-37 (1982), quoting RESTATEMENT (SECOND) OF TORTS § 595 (1981). See also *Thiel v. Dove*, 229 Ark. 601, 317 S.W.2d 121 (1958) (discussing qualified privilege).

The determination of the existence of a qualified privilege is a question of law. *Minor v. Failla*, 329 Ark. 274, 946 S.W.2d 954 (1997), overruled on other grounds, *United Ins. Co. of America v. Murphy*, 331 Ark. 364, 961 S.W.2d 752 (1998) (abolishing presumed damages doctrine). Once the court determines that a statement is subject to a qualified privilege, the burden of establishing facts that would defeat the privilege becomes a part of plaintiff's burden of proof, together with the other elements of defamation. *Ikani v. Bennett*, 284 Ark. 409, 413, 682 S.W.2d 747, 749 (1985), citing *W. PAGE KEETON, PROSSER AND KEETON ON TORTS*, § 115 at p. 835 (5th Ed. 1984). The question of whether a particular statement falls outside the scope of the qualified privilege is a question of fact for the jury. *Wal-Mart Stores, Inc. v. Lee*, 348 Ark. 707, 735, 74 S.W.3d 634, 654 (2002).

For cases considering application of the qualified privilege to various circumstances, see *Minor, supra* (no evidence that public officials exceeded their official duties in discussing investigation of insurance claim); *Sawada v. Walmart Stores, Inc.*, 2015 Ark. App. 549 (concluding that plaintiff had raised a genuine issue of material fact regarding whether Walmart breached its qualified-privilege duty to accurately report the basis for an employee's termination in its statement to police officer, whose report of that statement, quoted in the local newspaper, contained the allegedly defamatory communication); *Addington v. Wal-Mart Stores, Inc.*, 81 Ark. App. 441, 105 S.W.3d 369 (2003) (qualified privilege applied to protect statements made in good faith by a loss-prevention officer to law enforcement officers and to appropriate personnel within his company; the privilege was not lost through excessive

publication); *Wal-Mart Stores, Inc., v. Lee, supra* (statements made by the same loss-prevention officer in *Addington* were not protected by a qualified privilege because the officer did not have any grounds to believe that statements made to him in a case synopsis were true); *Superior Fed. Bank v. Mackey*, 84 Ark. App. 1, 129 S.W.3d 324 (2003) (factual dispute existed concerning whether a bank acted in good faith in stating that a contractor was not on an alleged “approved contractor’s list”); *Suggs v. Stanley*, 324 F.3d 672 (8th Cir. 2003) (sufficient evidence for jury to determine that defendants acted with malice—motivated by spite and personal gain—such that their statements to police and coroner were not protected by qualified privilege); *Freeman v. Bechtel Constr. Co.*, 87 F.3d 1029, 1031 (8th Cir. 1996) (statements made in connection with investigation of sexual harassment allegations were within scope of privilege).

Research References

West’s Key Number Digest

Libel and Slander ⇨124(6)

AMI 410

**ISSUES—CLAIM FOR DAMAGES BASED UPON
DEFAMATION—PRIVATE FIGURE—REPORT OF
OFFICIAL PROCEEDING OR PUBLIC MEETING**

_____ claims damages from _____ for defama-
(Plaintiff) (defendant)
tion and has the burden of proving each of the follow-
ing five essential propositions defining defamation:

First, that *[he][she]* sustained damages;

Second, that _____ published a false statement
(defendant)
of fact concerning _____;
(plaintiff)

Third, that the statement of fact was defamatory;

Fourth, that _____ acted *[with negligence in fail-*
(defendant)
ing to determine the truth of the statement prior to its
publication] [or] [with knowledge the statement was
false]; and

Fifth, that the publication of the statement was a
proximate cause of _____'s damages.
(plaintiff)

In addition to these essential propositions, there
is an additional proposition _____ must prove.
(plaintiff)

The statement _____ claims _____ published
(plaintiff) (defendant)
was of an *[official proceeding] [or] [public meeting]*.
There is a "fair report" privilege with respect to such
a *[proceeding] [or] [meeting]*, under which _____ is
(defendant)
not liable unless the publication exceeds the scope of
the privilege. Plaintiff contends that the publication
exceeded the scope of the privilege and has the

burden of proving that the publication did not accurately report the substance of the *[proceeding]* *[or]* *[meeting]* and that the failed to do what was reasonably necessary to insure that the publication was accurate and complete or a fair abridgment.

(defendant)

[If you find from the evidence in this case that each of the five essential propositions defining defamation has been proved and that the proposition necessary to overcome the privilege has been proved, then your verdict should be for ; but if, on the

(plaintiff)

other hand, you find from the evidence that any of the five essential elements defining defamation or that the proposition necessary to overcome the privilege has not been proved, then your verdict should be for

 .]
(defendant)

NOTE ON USE

Use this instruction only if the privilege claimed is based on a report of an official proceeding or a public meeting.

Use AMI 411 and 412 when this instructions is given.

Do not use the final bracketed paragraph when the case is submitted on interrogatories.

COMMENT

In *Butler v. Hearst—Argyle Television*, 345 Ark. 462, 49 S.W.3d 116 (2001), the court applied the fair reporting privilege as defined in the RESTATEMENT (SECOND) OF TORTS § 611 (1977) and concluded that neither the fact that the publication was motivated by malice nor the fact that the defendant believed the statement to be false negates the benefit of the privilege. See also *KARK-TV v. Simon*, 280 Ark. 228, 656 S.W.2d 702 (1983) (court found if appellant had the privilege, it was lost by appellant's failure to give an accurate and fair report since the report wrongfully accused appellees of involvement in robbery); *Jones v. Commercial Printing Co.*, 249 Ark. 952, 463 S.W.2d 92 (1971) (instructions requiring actual malice in defamation involving the erroneous reporting of court proceedings were in error since judicial proceedings

are capable of exact reporting in every instance); *Brandon v. Gazette Publishing Co.*, 234 Ark. 332, 352 S.W.2d 92 (1961) (newspaper's publication of governor's press releases regarding investigation of nursing home considered privileged since releases were published accurately, impartially and in good faith).

The court most recently reaffirmed the fair-report privilege as a defense to a defamation action in *Whiteside v. Russellville Newspapers, Inc.*, 2009 Ark. 135, 295 S.W.3d 798. There, the privilege attached to a newspaper article citing a witness statement in an active police investigation that was inadvertently but voluntarily released to the publisher. Employing the substantial truth doctrine, the court further found that the privilege was not eliminated since the article was in essence true.

Research References

West's Key Number Digest
Libel and Slander ¶124

AMI 411

DEFINITION OF DEFAMATORY

A defamatory statement is a statement of fact that is false and actually causes harm to a person's reputation. In determining whether the statement was defamatory, it must be considered as a whole, and the words must be taken in their plain and natural meaning. In determining whether or not a recipient of the statement reasonably understood the statement in a defamatory sense, you must take into account the surrounding circumstances known to the recipient at the time the statement was made.

NOTE ON USE

Use this instruction if either AMI 407, 408, 409, or 410 is given.

COMMENT

This instruction was cited with approval in *Boellner v. Clinical Study Centers, LLC*, 2011 Ark. 83.

The truth of a statement is a defense to defamation, but the exact truth is not required. *Pritchard v. Times Southwest Broadcasting, Inc.*, 277 Ark. 458, 642 S.W.2d 877 (1982). In *Pritchard*, the court stated: "[I]t is now generally agreed that it is not necessary to prove the literal truth of the accusation in every detail, and that it is sufficient to show that the imputation is substantially true, or as it is often put, to justify the 'gist', the 'sting' or the 'substantial truth' of the defamation." 277 Ark. at 463, 642 S.W.2d at 879.

Statements may be "defamation by innuendo" if they "are susceptible of two meanings, one defamatory and one harmless. In that regard, we read the words in their plain and natural meaning, as they would be interpreted by a reader of the newspaper considering the articles as a whole." 277 Ark. at 461, 642 S.W.2d at 878 (quoting *Wortham v. Little Rock Newspapers, Inc.*, 273 Ark. 179, 618 S.W.2d 156 (1981)); *Rachels v. Deener*, 182 Ark. 931, 33 S.W.2d 39 (1930).

United Ins. Co. of America v. Murphy, 331 Ark. 364, 961 S.W.2d 752 (1998), abolished the doctrine of presumed damages in defamation per se cases and announced that, prospectively, a plaintiff in a defamation case must prove reputational injury in order to recover damages.

The court cited with approval PROSSER & KEETON ON TORTS, § 112 (5th ed. 1984), which states, "Courts should require as a minimum for recovery in every case either evidence from which harm to reputation could reasonably be inferred or direct evidence of harm to reputation." See also *Wal-Mart Stores, Inc. v. Lee*, 348 Ark. 707, 731, 74 S.W.3d 634, 651 (2002) (jury was instructed that "a defamatory statement must be false and must actually cause harm to a person's reputation.").

A plaintiff must prove that the defamatory remark applies personally to the plaintiff as opposed to the plaintiff being a member of a class to which the comment was directed generally. *Pigg v. Ashley County Newspaper, Inc.*, 253 Ark. 756, 489 S.W.2d 17 (1973).

Research References

West's Key Number Digest

Libel and Slander ◊124(1), 124(4)

AMI 412

DEFINITION OF PUBLISHED AND PUBLICATION

When I use the terms “published” or “publication,” I am referring to the act of intentionally communicating the statement to someone other than the _____ or under circumstances in which it is foreseeable that the statement will be received by someone other than _____. This statement may be written, _____, spoken, or conveyed by means of gestures, pictures, or objects.

NOTE ON USE

Use this instruction if either AMI 407, 408, 409, or 410 is given.

COMMENT

This instruction is based in part on *Wal-Mart Stores, Inc. v. Lee*, 348 Ark. 707, 731, 74 S.W.3d 634, 651 (2002).

In *Navorro-Monzo v. Hughes*, 297 Ark. 444, 763 S.W.2d 635 (1989), the court stated that “since the interest protected is that of reputation, it is essential to tort liability for either libel or slander that the defamation be communicated to someone other than persons defamed. This element of communication is given the technical name of ‘publication,’ but this does not mean that it must be printed or written; it may be oral, or conveyed by means of gestures, or the exhibition of a picture or statue” (citing *PROSSER & KEETON ON TORTS*, § 113 (5th ed. 1984)).

A doctor’s dictation to a stenographer regarding his nurse employee was not considered publication, and the doctor’s letter to the nurse intercepted by the nurse’s husband also was not publication, since the doctor could not have foreseen that anyone other than the nurse would open the sealed letter to her. *Farris v. Tvedten*, 274 Ark. 185, 623 S.W.2d 205 (1981).

If communications received by third parties are protected by a qualified privilege there may be no publication unless there was an abuse by making the statement excessively or maliciously. See *Farris, supra*.

For a discussion of the issue of republication, see *Wal-Mart Stores, Inc. v. Lee, supra*, where the court indicated that an instruction concern-

ing the liability for republication should be submitted if the defendant seeks to limit its liability for republication.

Research References

West's Key Number Digest

Libel and Slander \approx 124(1)

AMI 413

**ISSUES—CLAIM FOR DAMAGES BASED UPON
MALICIOUS PROSECUTION—BURDEN OF PROOF**

_____ claims damages from _____ for malicious
(Plaintiff) (defendant)
prosecution and has the burden of proving each of
the following six essential propositions:

First, that *[he]/[she]* has sustained damages;

Second, that _____ caused *[civil] [criminal]*
(defendant)
proceedings to be *[initiated] [continued]* against _____
(plain
tiff);

Third, that the proceedings were terminated in
favor of _____;
(plaintiff)

Fourth, that _____ did not have probable cause
(defendant)
for *[initiating] [continuing]* the proceedings;

Fifth, that _____ acted with an improper or
(defendant)
sinister motive in *[initiating] [continuing]* the proceed-
ings against _____; and
(plaintiff)

Sixth, that _____'s acts were a proximate cause
(defendant)
of _____'s damages.
(plaintiff)

[If you find from the evidence in this case that
each of these propositions has been proved, then
your verdict should be for _____ (against the party or
(plaintiff)
parties who *[instituted] [continued]* the proceedings);
but if, on the other hand, you find from the evidence

that any of these propositions has not been proved,
 then your verdict should be for _____.]

 (defendant)

NOTE ON USE

Do not use the bracketed paragraph when the case is submitted on interrogatories, or when affirmative defenses are in issue.

When this instruction is given, also use AMI 414.

See AMI 2231 for an element of damages recoverable for this tort.

COMMENT

The elements of the tort of malicious prosecution are stated in *Harold McLaughlin Reliable Truck Brokers, Inc. v. Cox*, 324 Ark. 361, 368, 922 S.W.2d 327, 331 (1996); *Farm Service Co-operative, Inc. v. Goshen Farms, Inc.*, 267 Ark. 324, 331–32, 590 S.W.2d 861, 865 (1979); and *Kellerman v. Zeno*, 64 Ark. App. 79, 83–84, 983 S.W.2d 136, 138 (1998). The fifth element of this instruction was revised for the 2013 edition following the opinion of *Stokes v. Southern States Cooperative*, 651 F.3d 911, 917 (8th Cir. 2011) (predicting the Arkansas Supreme Court would define “malice” in the context of malicious prosecution as “any improper or sinister motive for instituting the suit”). The revision is supported by Arkansas case law. *See Sundeen v. Kroger*, 355 Ark. 138, 147, 133 S.W.3d 393, 398 (2003); *Cordes v. Outdoor Living Ctr.*, 301 Ark. 26, 32, 781 S.W.2d 31, 33–34 (1989); *Foster v. Pitts*, 63 Ark. 387, 391, 38 S.W. 1114, 1114 (1897). It is also supported by case law from other states, the Restatement (Second) of Torts § 676 (1981), and other secondary authorities. *See Prosser and Keeton on Torts* § 119 (W. Page Keeton et al eds., 5th ed. 1984); *Dan B. Dobbs, Paul T. Hayden & Ellen M. Bublick, Torts and Compensation* (West, 6th ed. 2009). *But see Wal-Mart Stores, Inc. v. Binns*, 341 Ark. 157, 164–65, 15 S.W.3d 320, 325 (2000) (suggesting without citation to authority that “ill will, hatred, or revenge” is required to establish a showing of malice in a malicious prosecution claim in reversing an award of punitive damages).

“Malice may be inferred from lack of probable cause, but . . . lack of probable cause may not be inferred from malice.” *Cordes v. Outdoor Living Ctr., Inc.*, 301 Ark. at 31, 781 S.W.2d at 33 (1989) (citing *Malvern Brick & Tile Co. v. Hill*, 232 Ark. 1000, 1004, 342 S.W.2d 305, 307 (1961)). “[O]ne who continues a civil proceeding [or a criminal prosecution] that has properly been begun or one who takes an active part in its continuation for an improper purpose after he has learned that there is no probable cause for the proceeding [or prosecution] becomes liable as if he had then initiated the proceeding [or prosecution].” Restatement Second Torts §§ 655 cmt. c., 674 (1977). The malicious prosecution of a case, improperly continued, may also constitute an abuse of process.

Routh Wrecker Serv., Inc. v. Washington, 335 Ark. 232, 238–39, 980 S.W.2d 240, 243 (1998).

Although *nolle pros* of a criminal proceeding is a favorable termination, Culpepper v. Smith, 302 Ark. 558, 792 S.W.2d 293 (1990), non-suit of a civil proceeding is not. *Farm Service Coop.*, 267 Ark. at 335, 590 S.W.2d at 867. *But see Sundeen v. Kroger*, 355 Ark. at 146, 133 S.W.3d at 398 (2003) (holding that a district court's conviction of a defendant is conclusive proof of the existence of probable cause even though the prosecutor *nolle prossed* all charges on a *de novo* appeal to the circuit court). “[T]here [is] no basis for the filing of a counterclaim for malicious prosecution in the same action that [is] alleged to . . . [be] the basis of the malicious prosecution.” *Forever Green Athletic Fields, Inc. v. Lasiter Constr., Inc.*, 2011 Ark. App. 347, at 16.

Malicious prosecution is an intentional tort to which comparative fault is inapplicable. *Kellerman*, 64 Ark. App. at 88–89, 983 S.W.2d at 141.

Submission of punitive damages is appropriate in a malicious prosecution case where there has been a showing of “willfulness, wantonness, or conscious indifference” on the part of the defendant. *See Harold McLaughlin Reliable Truck Brokers, Inc.*, 324 Ark. at 371, 922 S.W.2d at 333 (holding that the jury could have concluded that the defendants mischaracterized facts to a prosecutor for the improper purpose of intimidating the plaintiff and forcing the plaintiff to act). In submitting an instruction on punitive damages, the plaintiff must at least include the scienter standard required by the underlying tort, and it is error to give a punitive damages instruction that requires a lesser standard. *See Wal-Mart v. Binns*, 341 Ark. at 164–65, 15 S.W.3d at 325. *See also* AMI 2218 and accompanying Comment.

It is a defense to a charge of malicious prosecution that the defendant presented to competent counsel “a full, fair, and truthful disclosure of all facts known to him” and then acted upon the advice of such counsel in good faith in commencing the proceeding. *See Harold McLaughlin Reliable Truck Brokers, Inc.*, 324 Ark. at 368, 922 S.W.2d at 332–33; AMI 415.

Research References

West's Key Number Digest
Malicious Prosecution ⇨72

Legal Encyclopedias, *Corpus Juris Secundum*
C.J.S., Malicious Prosecution or Wrongful Litigation § 139

AMI 414

DEFINITION—PROBABLE CAUSE

“Probable cause” means the existence of facts or credible information that would induce a person of ordinary caution to believe that the person *[accused]* *[against whom civil proceedings are (initiated) (continued)]* is *[guilty of the crime]* *[liable for the conduct]* with which *[he][she]* was charged.

NOTE ON USE

Use this instruction where AMI 412 is given.

Select the appropriate bracketed phrase, depending upon whether the prior proceeding was civil or criminal.

COMMENT

Probable cause, in the context of malicious prosecution, is defined in *Cordes v. Outdoor Living Center, Inc.*, 301 Ark. 26, 781 S.W.2d 31 (1989); and *Kellerman v. Zeno*, 64 Ark. App. 79, 983 S.W.2d 136 (1998).

For analysis of the probable cause element, see *Coombs v. Hot Springs Village Property Owners Ass’n*, 98 Ark. App. 226, 254 S.W.3d 5 (2007). See also *Wal-Mart Stores, Inc. v. Binns*, 341 Ark. 157, 15 S.W.3d 320 (2000) (reversing trial court’s denial of defendant’s directed verdict motion based on insufficient evidence of probable cause or malice).

Research References

West’s Key Number Digest
Malicious Prosecution ⇨72(2)

Legal Encyclopedias
C.J.S., Malicious Prosecution or Wrongful Litigation § 139

AMI 415

**DEFENSE—MALICIOUS PROSECUTION—ACTING
UPON THE ADVICE OF COUNSEL**

 contends and has the burden of proving
(Defendant)
that prior to the initiation of the *[civil proceeding]*
[criminal prosecution] *[he][she][it]* presented to an at-
torney a full, fair, and truthful disclosure of all facts
known to *[him][her][it]*, and that *[he][she][it]*, in good
faith, relied upon the advice of such attorney, in com-
mencing such *[civil proceeding]* *[criminal*
prosecution].

[If you find from a preponderance of the evidence
in this case that this has been proved, then your
verdict should be for].
(defendant)

NOTE ON USE

Use this instruction where the defense of acting upon advice of an attorney in initiating the prior proceedings is interposed as a defense.

Do not use the bracketed sentence if the case is submitted on interrogatories.

Where a defendant's conduct is alleged to be tortious by the continuation, rather than the initiation, of a civil proceeding or a criminal prosecution, and where the defendant contends that such continuation was based upon advice of counsel, the language of this instruction should be appropriately modified:

COMMENT

This instruction is a correct statement of the law. *Harold McLaughlin Reliable Truck Brokers, Inc. v. Cox*, 324 Ark. 361, 922 S.W.2d 327 (1996); *Culpepper v. Smith*, 302 Ark. 558, 792 S.W.2d 293 (1990); *Kellerman v. Zeno*, 64 Ark. App. 79, 983 S.W.2d 136 (1998). "The rule that affords a defense to an action for malicious prosecution for one who has acted on the advice of counsel applies with greater force if the proceeding was instituted on the advice and approval of the state's prosecuting attorney." *Patrick v. Tyson Foods, Inc.*, 2016 Ark. App. 221, 14; see also

Jennings Motors v. Burchfield, 182 Ark. 1047, 34 S.W.2d 455 (1931) (finding that defendant was entitled to defense where undisputed evidence showed that defendant acted in good faith by disclosing all facts in its possession to its personal attorney and the prosecuting attorney).

Where evidence is in conflict, it is for a jury to determine both what facts were known to defendant, and whether those facts were completely and impartially presented to the attorney. *Kellerman, supra*.

Research References

West's Key Number Digest

Malicious Prosecution ⇨72(3)

Legal Encyclopedias

C.J.S., Malicious Prosecution or Wrongful Litigation § 139

AMI 416

**ISSUES—CLAIM FOR DAMAGES BASED UPON
ABUSE OF PROCESS—BURDEN OF PROOF**

 claims damages from for abuse of
(Plaintiff) (defendant)
process and has the burden of proving each of the
following five essential propositions:

First, that *[he][she]* has sustained damages;

Second, that set in motion a legal proceed-
(defendant)
ing directed at ;
(plaintiff)

Third, that the proceeding was used to accom-
plish an ulterior purpose for which it was not de-
signed;

Fourth, that willfully used process in a
(defendant)
manner not proper in the regular conduct of the
proceeding; and

Fifth, that 's acts were a proximate cause
(defendant)
of 's damages.
(plaintiff)

[If you find from the evidence in this case that
each of these propositions has been proved, then
your verdict should be for ; but if, on the other
(plaintiff)
hand, you find from the evidence that any of these
propositions has not been proved, then your verdict
should be for .]
(defendant)

NOTE ON USE

Do not use the bracketed sentence when the case is submitted on interrogatories.

COMMENT

In *National Bank of Arkansas v. River Crossing Partners, LLC*, 2011 Ark 475, at 11, the Arkansas Supreme Court reiterated the elements necessary to prove the tort of abuse of process, which had previously been set forth in *South Arkansas Petroleum Co. v. Schiesser*, 343 Ark. 492, 36 S.W.3d 317 (2001).

The mere filing of a vexatious lawsuit is insufficient because abuse of process is a narrow tort. *Union Nat'l Bank of Little Rock v. Kutait*, 312 Ark. 14, 17–18, 846 S.W.2d 652, 654 (1993). “It is the purpose for which the process is used, once issued, that is . . . importan[t]” in reaching a conclusion regarding whether the proceeding is “perverted to accomplish an ulterior purpose for which [the process] was not designed.” *Harmon v. Carco Carriage Corp.*, 320 Ark. 322, 327, 895 S.W.2d 938, 940 (1995).

Research References

West's Key Number Digest
Process ¶209

Legal Encyclopedias
C.J.S., Process § 114

AMI 417

**ISSUES—CLAIM FOR DAMAGES BASED UPON
ASSAULT—BURDEN OF PROOF**

_____ claims damages from _____ for assault
(Plaintiff) (defendant)
and has the burden of proving each of the following
three essential propositions:

First, that _____ acted in such a manner as to
(defendant)
create a reasonable apprehension of immediate harmful or offensive contact upon the person of _____;
(plaintiff)

Second, that _____ intended to cause that apprehension; and
(defendant)

Third, that _____ was actually put in that apprehension.
(plaintiff)

[If you find from the evidence in this case that each of these propositions has been proved, then your verdict should be for _____; but if, on the other
(plaintiff)
hand, you find from the evidence that any of these propositions has not been proved, then your verdict should be for _____.]
(defendant)

NOTE ON USE

Do not use the bracketed sentence if the case is submitted on interrogatories.

COMMENT

Although the tort of assault frequently arises in connection with a battery, no actual physical contact is necessary to constitute an assault. See RESTATEMENT (SECOND) OF TORTS § 21, cmt. c (1965).

Words alone, including indecent proposals, without the accompanying threat of physical contact, are insufficient to constitute an assault. *Cooper v. Demby*, 122 Ark. 266, 183 S.W. 185 (1916); *Davis v. Richardson*, 76 Ark. 348, 89 S.W. 318 (1905).

Self-defense may constitute a defense to a civil action for assault and battery. *Downey v. Duff*, 106 Ark. 4, 152 S.W. 1010 (1912).

Since assault is essentially a mental, rather than a physical, invasion, damages are recoverable for the plaintiff's mental suffering, as well as for any physical illness resulting from the assault. The establishment of the technical cause of action, even without proof of harm, entitles the plaintiff to vindication of his or her legal right by an award of nominal damages. *Davis, supra*. See also *Fritz v. Baptist Mem. Health Care Corp.*, 92 Ark. App. 181, 211 S.W.3d 593 (2005) (citing additional cases and distinguishing assault claims from negligence claims with respect to nominal damages).

Research References

West's Key Number Digest
Assault and Battery ◊43

Legal Encyclopedias
C.J.S., Assault §§ 61 to 63

AMI 418.

**ISSUES—CLAIM FOR DAMAGES BASED UPON
BATTERY—BURDEN OF PROOF**

 claims that committed battery and
(Plaintiff) (defendant)
has the burden of proving each of two essential
propositions:

First, that acted with intent to cause some
(defendant)
harmful or offensive contact with a person, or acted
with the intent to create the apprehension of some
harmful or offensive contact with a person; and

Second, that a harmful or offensive contact with
 resulted.
(plaintiff)

[If you find from the evidence in this case that
both of these propositions have been proved, then
your verdict should be for ; but if, on the other
(plaintiff)
hand, you find from the evidence that any of these
propositions has not been proved, then your verdict
should be for .]
(defendant)

NOTE ON USE

Do not use the bracketed sentence if the case is submitted on
interrogatories.

COMMENT

This instruction is based on the RESTATEMENT (SECOND) OF TORTS § 13
(1965).

As to nominal damages, *see* Comment to AMI 419.

Research References

West's Key Number Digest
Assault and Battery ⇨43

Legal Encyclopedias
C.J.S., Assault §§ 61 to 63

418 111A

...and has the burden of proving
...[that] actual damages, as opposed to nominal
damages. "Nominal damages" means a small sum
awarded but is a violation of one's legal right
...[that] you find from the evidence in this case that
...is entitled to recover for the
...[that] you find that the defendant is entitled to recover the actual damages
...[that] the evidence to have been primarily
caused by ...
...you find that ...
...or you cannot ascertain the amount from the
evidence ...
and you should award ...

NOTE ON USE

Do not use the bracketed sentence when the case is submitted on
...
This instruction should be given where the nature of the tort in is-
sue is proved. It would entitle the plaintiff to nominal damages and
...
A description of the tort in issue, etc., but they should be inserted in
the indicated blank space.

If this instruction is given, then AMI 2901 and other appropriate
instructions from Chapter 23 should be given. AMI 2901 should be used

AMI 419

ISSUES—CLAIM FOR ACTUAL DAMAGES BASED
UPON INTENTIONAL TORT—BURDEN OF PROOF

 contends, and has the burden of proving
(Plaintiff)
that 's proximately caused *[him]*
(defendant) (description of tort)
[her][it] actual damages, as opposed to nominal
damages. "Nominal damages" means a small sum
awarded due to a violation of, and to vindicate, a
person's legal right.

[If you find from the evidence in this case that
 is entitled to recover for the , then
(plaintiff) (description of tort)
[he][she][it] is entitled to recover the actual damages
shown by the evidence to have been proximately
caused by 's wrongful conduct. If however,
(defendant)
you find that has failed to prove actual dam-
(plaintiff)
ages, or you cannot ascertain the amount from the
evidence, is nevertheless entitled to recover,
(plaintiff)
and you should award *[him][her][it]*, nominal
damages.]

NOTE ON USE

Do not use the bracketed sentence when the case is submitted on interrogatories.

This instruction should be given where the nature of the tort in issue, if proved, would entitle the plaintiff to nominal damages, and where the plaintiff contends that he has sustained actual damages.

A description of the tort in issue, e.g., battery, should be inserted in the indicated blank space.

If this instruction is given, then AMI 2201 and other appropriate instructions from Chapter 22 should be given. AMI 2201 should be mod-

ified to indicate that a finding for the plaintiff entitles him to an award of nominal damages, even though no other damages are proved. The following modification of the first paragraph of AMI 2201 is suggested:

“[If you decide for _____ on the question of
(plaintiff)
liability (against any party [he][she][it] is suing)]
[If an interrogatory requires you to assess the
damages of _____], you should award nominal
(plaintiff)
damages, and, in addition, you must then fix the
amount of money [which will reasonably and
fairly compensate [him][her][it] for any of the fol-
lowing _____ elements of damage sustained]
(number)
[which you find were proximately caused by
_____]”
(defendant)

COMMENT

In *Agracat, Inc. v. AFS-NWA, LLC*, 2010 Ark. App. 459, the court discussed the issue of proof necessary for a damage award: “Arkansas has never insisted on exactness of proof in determining damages, and if it is reasonably certain that some loss occurred, it is enough that damages can be stated only approximately.” 2010 Ark. App. 459, at 7. The court noted that while testimony from an expert witness or officer of the plaintiff would have reduced the difficulty of determining the amount of damages, nevertheless damages were not unrecoverable simply because they were problematic to ascertain. *Id.*

Certain wrongs entitle plaintiff, or the aggrieved party, to an award of nominal damages, even though no actual damages are proved. For discussions of nominal damages, see *Cathey v. Ark. Power & Light Co.*, 193 Ark. 92, 97 S.W.2d 624 (1936) and *Baker v. Armstrong*, 271 Ark. 878, 611 S.W.2d 743 (1981). See also *Fritz v. Baptist Mem. Health Care Corp.*, 92 Ark. App. 181, 211 S.W.3d 593 (2005) (distinguishing assault claims from negligence claims in holding that the failure to award nominal damages is not reversible error in a negligence case).

The Committee has not attempted to catalog those torts that require an award of nominal damages upon a finding of liability. In *Stoner v. Houston*, 265 Ark. 928, 582 S.W.2d 28 (1979), it was held that nominal damages will not support an award of punitive damages.

Research References

West's Key Number Digest
Damages ⇨211

Legal Encyclopedias
C.J.S., Damages § 428

AMI 420

**ISSUES—CLAIM FOR DAMAGES BASED UPON
INVASION OF PRIVACY BY INTRUSION UPON
SECLUSION**

 claims damages from for invasion
(Plaintiff) (defendant)
of privacy by intrusion upon 's seclusion and
(plaintiff)
has the burden of proving each of five essential
propositions:

First, that sustained damages;

(plaintiff)

Second, that intentionally intruded physi-
(defendant)
cally or otherwise upon 's solitude or seclusion
(plaintiff)
and believed or was substantially certain that
[he][she] lacked the necessary legal authority or
personal permission, invitation, or valid consent to
commit the intrusive act;

Third, that the intrusion was of a kind that would
be highly offensive to a reasonable person, as the
result of conduct to which a reasonable person would
strongly object;

Fourth, that conducted [himself][herself] in
(plaintiff)
a manner consistent with an actual expectation of
privacy; and

Fifth, that 's intrusion was a proximate
(defendant)
cause of 's damages.
(plaintiff)

[If you find from the evidence in this case that
each of these propositions has been proved, then

your verdict should be for _____; but if, on the other
 (plaintiff)
 hand, you find from the evidence that any of these
 propositions has not been proved, then your verdict
 should be for _____.
 (defendant)

NOTE ON USE

Do not use the final bracketed paragraph when the case is submitted on interrogatories.

COMMENT

The elements of this instruction were quoted with approval in *Coombs v. J.B. Hunt Transp., Inc.*, 2012 Ark. App. 24, at 4–5 (reversing a summary judgment in favor of defendant employer and two supervisors on intrusion upon seclusion claim that arose from plaintiff employee's sharing of a hotel room with his supervisor on a business trip).

An intrusion upon seclusion claim was submitted to the jury, which returned a verdict in favor of plaintiff, in *Wal-Mart Stores, Inc. v. Lee*, 348 Ark. 707, 74 S.W.3d 634 (2002) (the employer defendant intruded upon the employee plaintiff's solitude in searching his home and shop for allegedly stolen merchandise, exceeding the scope of the consent to search obtained). See also *Fletcher v. Price Chopper Foods of Trumann, Inc.*, 220 F.3d 871 (8th Cir. 2000) (reversing jury's verdict for plaintiff on her claim of intrusion upon seclusion, determining that defendant employer did not intrude in a highly offensive manner and that plaintiff lacked a reasonable expectation of privacy in the information); *Williams v. Am. Broad. Cos.*, 96 F.R.D. 658, 669 (W.D. Ark. 1983) (distinguishing the four forms of invasion of privacy: intrusion upon seclusion (AMI 420), disclosure of private facts (AMI 422), placing in a false light, (AMI 423) and appropriation of name or likeness (AMI 421)); *CBM of Cent. Ark. v. Bemel*, 274 Ark. 223, 623 S.W.2d 518 (1981) (determining that, based on plaintiff debtor's testimony that an agency made repeated calls to her at her home and place of employment, the jury could have found a wrongful invasion of privacy); *RESTATEMENT (SECOND) OF TORTS* § 652B (1977).

Relying on *Ward v. Blackwood*, 41 Ark. 295, 298 (1883), as well as the *Restatement (Second) of Torts* § 652I (1977), the court in *Cannady v. St. Vincent Infirmary Med. Ctr.*, 2012 Ark. 369, at 8, held that the Arkansas survival statute, Ark. Code Ann. § 16-62-101, does not provide for the claim of invasion of privacy by intrusion upon seclusion to survive the death of the decedent.

Research References

West's Key Number Digest
 Torts ⇨ 380

AMI 421

ISSUES—CLAIM FOR DAMAGES BASED UPON
INVASION OF PRIVACY BY APPROPRIATION

 claims damages from for invasion
(Plaintiff) (defendant)
of privacy by appropriation, and has the burden of
proving each of five essential propositions:

First, that *[her]/[she]* sustained damages;

Second, that used 's *[name] [or]*
(defendant) (plaintiff)
[likeness];

Third, that the public was able to identify in
(plaintiff)
 's use of the *[name] [or] [likeness]*;
(defendant)

Fourth, that 's use of 's *[name] [or]*
(defendant) (plaintiff)
[likeness] was for 's own purposes or benefit,
(defendant)
commercial or otherwise; and

Fifth, that 's actions were a proximate
(defendant)
cause of 's damages.
(plaintiff)

[If you find from the evidence in this case that
each of these propositions has been proved, then
your verdict should be for ; but if, on the other
(plaintiff)
hand, you find from the evidence that any of these
propositions has not been proved, then your verdict
should be for].
(defendant)

NOTE ON USE

Do not use the final bracketed paragraph when the case is submitted on interrogatories or if an affirmative defense is utilized.

COMMENT

This cause of action was first recognized in *Olan Mills, Inc. of Tex. v. Dodd*, 234 Ark. 495, 353 S.W.2d 22 (1962).

The court in *Stanley v. General Media Communications, Inc.*, 149 F. Supp. 2d 701, 706 (W.D. Ark. 2001) confirmed that this tort “. . . requires *commercial* use of a person’s name or likeness” (emphasis in original). That opinion also refers to the broader standard employed in this instruction derived from RESTATEMENT (SECOND) OF TORTS § 652C (1977). The Arkansas Supreme Court has relied on the Restatement in defining causes of action based on invasion of privacy. *See, e.g., Dunlap v. McCarty*, 284 Ark. 5, 678 S.W.2d 361, 364 (1984) (examining the privacy torts and the supporting RESTATEMENT provisions).

Relying on *Ward v. Blackwood*, 41 Ark. 295, 298 (1883), as well as the Restatement (Second) of Torts § 652I (1977), the court in *Cannady v. St. Vincent Infirmary Med. Ctr.*, 2012 Ark. 369, at 8, held that the Arkansas survival statute, Ark. Code Ann. § 16-62-101, does not provide for the claim of invasion of privacy by intrusion upon seclusion (AMI 420) to survive the death of the decedent. However, the *Cannady* court’s reliance on the comment to Restatement (Second) of Torts § 652I (1977) suggests that a claim for invasion of privacy by appropriation would survive the death of the decedent.

Research References

West’s Key Number Digest
Torts ¶405

AMI 422

**ISSUES—CLAIM FOR DAMAGES BASED UPON
INVASION OF PRIVACY BY PUBLIC DISCLOSURE
OF PRIVATE FACTS**

 claims damages from for invasion
(Plaintiff) (defendant)
of privacy by public disclosure of private facts about
 , and has the burden of proving each of seven
(plaintiff)
essential propositions:

First, that [he][she] sustained damages;

Second, that made a public disclosure of
(defendant)
a fact about ;
(plaintiff)

Third, that before this disclosure the fact was not
known to the public;

Fourth, that a reasonable person would find
disclosure of the fact highly offensive;

Fifth, that knew or should have known
(defendant)
that the disclosed fact was private;

Sixth, that the fact was not of legitimate public
concern; and

Seventh, that the public disclosure of the fact was
a proximate cause of 's damages.
(plaintiff)

The term "public disclosure" means communicat-
ing to the public at large or to so many persons that
the matter is substantially certain to become one of
public knowledge.

A public disclosure is highly offensive when a reasonable person would feel seriously upset or embarrassed by it. Public disclosure of normal daily activities or of unflattering conduct that would cause minor or even moderate annoyance to a person of ordinary sensitivities cannot be considered highly offensive.

In determining whether the fact[s] were not of legitimate public concern, the following factors should be considered: (1) the social value of the fact published, (2) the depth of the intrusion into _____'s (plaintiff) private affairs, (3) the extent to which _____ voluntarily (plaintiff) placed [himself][herself] into a position of public notoriety, [(4) the nature of the state's interest in preventing the disclosure,] (5) whether the fact is a matter of public record [and (6) if the fact publicized concerned events that occurred in the past, whether there is any continued public interest in the fact published].

[If you find from the evidence in this case that each of these propositions has been proved, then your verdict should be for _____; but if, on the other (plaintiff) hand, you find from the evidence that any of these propositions has not been proved, then your verdict should be for _____.]

(defendant)

NOTE ON USE

Do not use the final bracketed paragraph when the case is submitted on interrogatories or if an affirmative defense is utilized.

Use the bracketed language in the next to the last paragraph only if the evidence warrants.

COMMENT

The privileges and defenses applicable to defamation also apply to

invasions of privacy involving publication. RESTATEMENT (SECOND) OF TORTS §§ 652F to 652G (1977). See *Dunlap v. McCarty*, 284 Ark. 5, 9, 678 S.W.2d 361, 363–364 (1984) (applying the one-year limitations period applicable to slander claims to bar an invasion of privacy claim based solely on spoken words); *Williams v. American Broadcasting Cos., Inc.*, 96 F.R.D. 658, 669 (W.D. Ark. 1983); (examining whether a reporter's or journalist's privilege barred a discovery request by plaintiff asserting a privacy claim); RESTATEMENT (SECOND) OF TORTS § 652D (1977).

The First Amendment limits the availability of civil damages for truthful publication of lawfully obtained information concerning a matter of public concern. See, e.g., *Bartnicki v. Vopper*, 532 U.S. 514, 121 S. Ct. 1753, 149 L. Ed. 2d 787 (2001) (application of private damages remedy under federal and state wiretap statutes to truthful publication of lawfully obtained information that was illegally intercepted by an unknown person violated First Amendment); *The Florida Star v. B.J.F.*, 491 U.S. 524, 109 S. Ct. 2603, 105 L. Ed. 2d 443 (1989) (imposition of civil damages on newspaper for accurately publishing name of rape victim lawfully obtained from publicly released police report violated First Amendment); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975) (civil damages award for publication of name of rape-murder victim lawfully obtained from courthouse records violated First Amendment).

Relying on *Ward v. Blackwood*, 41 Ark. 295, 298 (1883), as well as the Restatement (Second) of Torts § 652I (1977), the court in *Cannady v. St. Vincent Infirmary Med. Ctr.*, 2012 Ark. 369, at 8, held that the Arkansas survival statute, Ark. Code Ann. § 16-62-101, does not provide for the claim of invasion of privacy by intrusion upon seclusion (AMI 420) to survive the death of the decedent. Although the issue was not before the court in *Cannady*, the court's reliance on *Ward* and the Restatement suggests that a claim for invasion of privacy by public disclosure of private facts would also not survive the death of the decedent.

Research References

West's Key Number Digest
Torts ⇨381

AMI 423

ISSUES—CLAIM FOR DAMAGES BASED UPON
FALSE LIGHT INVASION OF PRIVACY

 claims damages from for invasion
(Plaintiff) (defendant)
of privacy by publicity which put in a false light,
(plaintiff)
and has the burden of proving each of five essential
propositions:

First, that [he][she] sustained damages; and

Second, that gave publicity to a matter
(defendant)
concerning that placed [him][her] before the
(plaintiff)
public in a false light;

Third, that the false light in which was
(plaintiff)
placed would cause a reasonable person to be justified in feeling seriously offended and aggrieved by the publicity; and

Fourth, that 's giving of such publicity was
(defendant)
a proximate cause of 's damages.
(plaintiff)

 must prove these first four propositions by
(Plaintiff)
a preponderance of the evidence. I have defined the term "preponderance of the evidence" in a separate instruction.

Fifth, the burden is also on to prove by
(plaintiff)
clear and convincing evidence that published
(defendant)
the false light fact, knowing it was false or with a high degree of awareness of its probable falsity. "Clear

and convincing” evidence is proof that enables you without hesitation to reach a firm conviction that the allegation is true.

[If you find from the evidence in this case that each of these propositions has been proved, then your verdict should be for _____; but if, on the other hand, you find from the evidence that any of these propositions has not been proved, then your verdict should be for _____].

(plaintiff)

(defendant)

NOTE ON USE

Do not use the final bracketed paragraph when the case is submitted on interrogatories or if an affirmative defense is utilized.

COMMENT

The privileges and defenses applicable to defamation also apply to invasions of privacy involving publication. RESTATEMENT (SECOND) OF TORTS §§ 652F to 652G (1977).

In *Peoples Bank and Trust Co. of Mountain Home v. Globe Intern. Pub., Inc.*, 978 F.2d 1065, 1068 (8th Cir. 1992), the publisher asserted the defense that its written work was fiction that no reasonable reader would believe true and, therefore, was not actionable. The court found that statements are not protected by the defense of qualified privilege if the author lacks a belief in their truthfulness. *See also Wal-Mart Stores, Inc. v. Lee*, 348 Ark. 707, 74 S.W.3d 634 (2002) (employer asserted the defense of qualified privilege); *Dodson v. Dicker*, 306 Ark. 108, 812 S.W.2d 97, 98–99 (1991) (determining that the tenor of defendant’s language was figurative or hyperbolic negating the implied fact, and, therefore, concluding the language was not actionable); *Dodrill v. Arkansas Democrat Co.*, 265 Ark. 628, 590 S.W.2d 840 (1979), *cert. denied*, 444 U.S. 1076, 100 S. Ct. 1024, 62 L. Ed. 2d 759 (1980) (requiring plaintiff to prove actual malice to recover on a claim of false light invasion of privacy); RESTATEMENT (SECOND) OF TORTS §§ 652E (1977).

The extraordinary burden of proof is mandated by the First Amendment to the United States Constitution. *See Time, Inc. v. Hill*, 385 U.S. 374, 87 S. Ct. 534, 17 L. Ed. 2d 456 (1967); *Dodrill*, 265 Ark. at 639, 590 S.W.2d at 845. In *Peoples Bank and Trust Co. of Mountain Home v. Globe Intern. Pub., Inc.*, *supra*, 978 F.2d at 1067 fn. 2, the court concluded the “actual malice” standard was not required of a plaintiff who was not a public figure when the charged speech involved no issue

of public concern, citing to *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761, 105 S. Ct. 2939, 2946, 86 L. Ed. 2d 593 (1985). This issue was expressly left unresolved in *Wal-Mart Stores, Inc. v. Lee*, *supra*.

Relying on *Ward v. Blackwood*, 41 Ark. 295, 298 (1883), as well as the Restatement (Second) of Torts § 652I (1977), the court in *Cannady v. St. Vincent Infirmary Med. Ctr.*, 2012 Ark. 369, at 8, held that the Arkansas survival statute, Ark. Code Ann. § 16-62-101, does not provide for the claim of invasion of privacy by intrusion upon seclusion (AMI 420) to survive the death of the decedent. Although the issue was not before the court in *Cannady*, the court's reliance on *Ward* and the Restatement suggests that a claim for false light invasion of privacy would also not survive the death of the decedent.

Research References

West's Key Number Digest
Torts ☞382

AMI 424

DEFENSE—INVASION OF PRIVACY—CONSENT

 contends that consented to any
 (Defendant) (plaintiff)
 invasion of privacy and has the burden of proving
 that , by words or conduct or both, freely and
 (plaintiff)
 voluntarily consented or led reasonably to
 (defendant)
 believe that *[he][she]* had *[authorized] [or] [agreed to]*
 's conduct in *[describe the conduct in issue,*
 (defendant)
e.g., publicizing of facts, use of plaintiff's likeness,
etc.].

[If you find from the evidence in this case that
 this proposition has been proved, then your verdict
 should be for .]
 (defendant)

NOTE ON USE

Do not use the bracketed paragraph when the case is submitted on interrogatories.

Do not use with AMI 420 since the absence of consent or other authority is part of a plaintiff's burden of proof under such a claim.

COMMENT

The privileges and defenses applicable to defamation also apply to invasions of privacy involving publication. RESTATEMENT (SECOND) OF TORTS §§ 652F to 652G (1977).

In *Wal-Mart Stores, Inc. v. Lee*, 348 Ark. 707, 74 S.W.3d 634 (2002), the court rejected Wal-Mart's defense that plaintiff consented to the invasion of his privacy, concluding that plaintiff did not validly consent to the scope of the search conducted by Wal-Mart. Plaintiff agreed to permit Wal-Mart employees onto his property to search for "fishing equipment and life jackets" but not more. *Id.* at 723. Plaintiff protested and, therefore, did not by his conduct acquiesce to the expanded-scope of the search. *Id.* at 726. Even though plaintiff executed a written consent-to-search form presented by law enforcement officials contacted by Wal-Mart to accompany Wal-Mart employees during the search, the

court determined there was sufficient evidence presented to uphold the jury's determination that plaintiff's consent was not given freely and without coercion. *Id.* at 724-25. *See also* Olan Mills, Inc. of Tex. v. Dodd, 234 Ark. 495, 353 S.W.2d 22 (1962) (upholding finding of invasion of privacy when no consent was obtained from plaintiff prior to distribution of her photograph).

In *Alexander v. Pathfinder, Inc.*, 189 F.3d 735, 742 (8th Cir. 1999), the court determined that plaintiff consented through her actions to audio recordings she claimed were an invasion of privacy because she saw defendant's employees with tape recorders but failed to protest.

Research References

West's Key Number Digest
Torts §379 to 382, 405

AMI 425

ISSUES—CLAIM FOR DAMAGES BASED UPON CONVERSION OF PERSONAL PROPERTY

 claims damages from for conver-
(Plaintiff) (defendant)
sion of and has the burden of proving
(personal property)
each of two essential propositions:

First, that [owned] [or] [was entitled to pos-
(plaintiff)
sess] the ; and
(personal property)

Second, that intentionally took or exer-
(defendant)
cised dominion or control over the in
(personal property)
violation of 's rights.
(plaintiff)

[If you find from the evidence in this case that
each of these propositions has been proved, then
your verdict should be for ; but if, on the other
(plaintiff)
hand, you find that any of these propositions has not
been proved, then your verdict should be for .]
(defendant)

NOTE ON USE

Do not use the bracketed last paragraph if the case is submitted on interrogatories.

In the first proposition, use either of the bracketed options, or both, depending upon the evidence of the case. The item(s) of personal property allegedly converted would typically be inserted in the instruction, but "(plaintiff's) property" would be an acceptable alternative.

For damages instructions, use AMI 419, modified as necessary, and AMI 2221 for the definition of "fair market value." Elements from instructions in Chapter 22 or from appropriate clauses prepared for the circumstances of the case may be inserted. *See, e.g.,* AMI 2228.

This instruction should not be used for a statutory claim for conversion of a negotiable instrument pursuant to Ark. Code Ann. § 4-3-420, for which an appropriate instruction will have to be prepared.

COMMENT

The tort of conversion is the exercise of dominion over property in violation of the rights of the owner or the person entitled to possession. *Grayson v. Bank of Little Rock*, 334 Ark. 180, 188, 971 S.W.2d 788, 792 (1998). “Unlike some jurisdictions, Arkansas does not require that the owner or person entitled to possession be completely deprived of their property in order for a conversion to occur.” *Integrated Direct Marketing, LLC v. May*, 2016 Ark. 281 at 4. Ownership is not always an essential element in conversion actions; withholding goods from those entitled to possession constitutes conversion. *Car Transp. v. Garden Spot Distribs.*, 305 Ark. 82, 86, 805 S.W.2d 632, 634 (1991). An allegation of an ownership interest or right to possession is essential in a conversion action. *Big A Warehouse Distribs., Inc. v. Rye Auto Supply*, 19 Ark. App. 286, 290, 719 S.W.2d 716, 718 (1986). “Possessory interest” is the present right to control property, including the right to exclude others, by a person who is not necessarily the owner. *Buck v. Gillham*, 80 Ark. App. 375, 381, 96 S.W.3d 750, 754 (2003).

For a case overturning a jury verdict for the defendant as against the weight of the evidence, applying many of the foregoing principles, and considering the defendant’s argument that the plaintiff had abandoned the property, *see Schmidt v. Stearman*, 98 Ark. App. 167, 253 S.W.3d 35 (2007).

Conversion is an intentional tort. The intent required is not conscious wrongdoing, but rather an intent to exercise dominion or control over the property that is in fact inconsistent with the plaintiff’s interest. The conversion does not have to be for the defendant’s use. *McQuillan v. Mercedes—Benz Credit Corp.*, 331 Ark. 242, 247, 961 S.W.2d 729, 732 (1998). A defendant may be liable for conversion for directing an agent to exercise dominion or control over property in a way that is inconsistent with the plaintiff’s interest. *See DWB, LLC v. D&T Pure Trust*, 2018 Ark. App. 283, 550 S.W.3d 420 (holding that the evidence supported a circuit court’s finding that parties had exercised dominion and control over a check that was deposited in the court registry because the parties had placed conditions on the release of the funds despite admitting that they had no legal claim to the funds); *Guy Maris Trust v. Truempor*, 2012 Ark. App. 232 (reversing a grant of summary judgment for the defendants on conversion in a timber cutting case on the grounds that a question of material fact existed as to whether the defendants’ son had authority to order the trees to be harvested).

Conversion’s origins in the common law form of action for trover at one time limited its reach to tangible personal property, a constraint eventually relaxed to include “conversion of a document in which

intangible personal property rights are merged” and the prevention of “the exercise of intangible rights of the kind customarily merged in a document” even if the document itself is not converted. Restatement (Second) of Torts § 242. The Arkansas Supreme Court recounted this history and extended conversion to include not only intangible rights “merged” into a document (e.g., a promissory note), but intangible rights that are merely recorded in a document over which the defendant exercised dominion or control. *Plunket-Jarrell Grocery Co. v. Terry*, 222 Ark. 784, 788-94, 263 S.W.2d 229, 230-35 (1953) (affirming jury verdict for conversion of accounts receivable, effected when defendants exercised control over plaintiffs’ account books). The court abandoned this last vestige of conversion’s relation to chattels in *Integrated Direct Marketing LLC v. May*, 2016 Ark. 281 at 6, in which the court ruled that “intangible property, such as electronic data, standing alone and not deemed a trade secret, can be converted” if the defendant’s actions deny, or are inconsistent with, the rights of the owner or person entitled to possession. In that case, the intangible property consisted solely of electronic files that the defendant downloaded to his own external hard drive.

An exculpatory clause in a lease providing that the lessor shall not be liable for loss, theft, or damage to the lessee’s property, or for any act of any person, does not preclude the lessee’s conversion claim for intentional acts by the lessor or its agent. *Gurlen v. Henry Mgmt., Inc.*, 2010 Ark. App. 855, at 5-6.

An unqualified refusal to surrender goods, stating no reason, or stating the wrong reason, is conversion even where there are unstated justifications. If the defendant insists upon charges or other conditions of delivery that he has no right to impose, conversion has occurred. *McQuillan*, 331 Ark. 242, 248, 961 S.W.2d 729, 732 (1998).

Proof of demand for return of property and refusal to do so is not necessary to support a conversion claim. *City Nat’l Bank of Fort Smith v. Goodwin*, 301 Ark. 182, 192, 783 S.W.2d 335, 340 (1990).

In a case involving a claim for conversion of timber under Ark. Code Ann. § 18-60-102, the Arkansas Court of Appeals ruled that the Civil Justice Reform Act of 2003, Ark. Code Ann. § 16-55-201(a), which abolished joint and several liability for “any action for personal injury, medical injury, *property damage*, or wrongful death,” did not apply. *Shamlin v. Quadrangle Enters., Inc.*, 101 Ark. App. 164, 175-76, 272 S.W.3d 128, 136-37 (2008) (emphasis added). The court reasoned that because conversion is a claim “for the wrongful possession or dispossession of another’s property,” but “does not necessarily involve damage to property, which would bring it within the reach of the statute,” the Act fails to evince with sufficient clarity an intention to modify the common law. *Id.* In *Shamlin*, the court affirmed a decision to hold the defendants jointly and severally liable for the fair market value of the timber cut and to apportion the award for the cost of restoring the damaged land.

Proximate causation is not an element of the tort of conversion, as damages naturally flow from a conversion, and nominal damages are recoverable, *Car Transp.*, 305 Ark. at 89, 805 S.W.2d at 636; see DAN B. DOBBS, *THE LAW OF TORTS* § 67, 150-153 (2000).

Ordinarily, the proper measure of damages for conversion of property is the fair market value of the property at the time and place of its conversion. Evidence based upon purchase, replacement, or rental prices is improper. *McQuillan*, 331 Ark. at 250, 961 S.W.2d at 733. The market value of the property is not, however, the only measure of the damages recoverable in an action for conversion; the circumstances of the case may require a different measure, including the expenses incurred as a result of the conversion. *First Nat'l Bank of Brinkley v. Frey*, 282 Ark. 339, 342, 668 S.W.2d 533, 535 (1984). In the illustrative instruction found in the Note on Use to AMI 419, nominal damages or actual damages based on fair market value do not require the element of proximate causation, but for consequential or special damages being sought, proximate causation may be an element.

The RESTATEMENT (SECOND) OF TORTS § 927 states that the plaintiff may recover either the fair market value at the time of the conversion, or in the case of commodities of fluctuating value, which are customarily traded on an exchange to which traders customarily resort, the highest replacement value of the commodity within a reasonable period during which it might have been replaced. See *Newburger Cotton Co. v. Stevens*, 167 Ark. 257, 267 S.W. 777 (1925). Additional special damages, discussed in the RESTATEMENT, include the following: (a) the additional value of a chattel due to additions or improvements made by a converter not in good faith (see *Bradley Lumber Co. v. Hamilton*, 117 Ark. 127, 173 S.W. 848 (1915); *In re Honeycutt*, 198 B.R. 306 (Bankr. E.D. Ark. 1996)); (b) the amount of any further pecuniary loss of which the deprivation has been a legal cause (see *Shepherd v. Looper*, 293 Ark. 29, 732 S.W.2d 150 (1987) (lost profits)); (c) interest from the time at which the value is fixed (see *Dugal Logging, Inc. v. Ark. Pulpwood*, 66 Ark. App. 22, 988 S.W.2d 25 (1999)); and (d) compensation for the loss of use not otherwise compensated.

The fact that the item was eventually returned to the owner does not necessarily bar recovery of damages for its conversion, but it may mitigate the damages. *Ford Motor Credit Co. v. Herring*, 267 Ark. 201, 206, 589 S.W.2d 584, 587 (1979). Generally, the law permits evidence of the return of the property to its owner in mitigation of damages only when certain circumstances are present: (1) that the owner accepted the return of the goods; (2) that the original conversion occurred by mistake; and (3) that the return of the goods occurred promptly after the discovery of the mistake and before the commencement of the action for conversion. *McQuillan*, 331 Ark. at 250, 961 S.W.2d at 733 (citing *McKenzie v. Tom Gibson Ford, Inc.*, 295 Ark. 326, 749 S.W.2d 653 (1988)). When the plaintiff brings a conversion action after return of the property, his damages may include any deterioration in value between the

time of the conversion and the time of return, plus special damages, such as loss of use and expenses of recovery. Restatement (Second) of Torts § 922, cmt. B (1979). Special damages resulting from the withholding of the property or properly incurred by the owner in the pursuit of it were discussed in *McQuillan*. The plaintiff eventually received possession of the converted property, and the court awarded damages in the amount of the costs that were expended in recovering the property, including attorney's fees, storage charges, and hauling expenses. The attorney's fees were incurred in attempting to recover possession of the trucks, not in prosecuting the conversion action. "[A]lthough attorney's fees incurred in the prosecution of a conversion action were not recoverable, those attorney's fees spent in recovering possession of the converted property were properly awarded as special damages by the trial court." *McQuillan*, 331 Ark. at 251, 961 S.W.2d at 734.

If the defendant has an equitable interest in the property, the plaintiff's recovery is limited to actual net amount of the plaintiff's interest. *Barham v. Standridge*, 201 Ark. 1143, 1146, 148 S.W.2d 648, 649 (1941).

For discussion of an Article 9 security interest raising issues of self-help and damages for the creditor's improper retention of the collateral, see *McIlroy Bank & Trust v. Seven Day Builders of Ark., Inc.*, 1 Ark. App. 121, 133, 613 S.W.2d 837, 843 (1981) ("The judgment should have been entered for the value of the equipment at the time of taking less the balance due on the purchase price, not by way of setoff, but as a proper application of the measure of damages."). If "breach of the peace" under Ark. Code Ann. § 4-9-609 is an issue, see *Ford Motor Credit Co.*, 267 Ark. at 203, 589 S.W.2d at 585-586 ("In pre-code cases, we have sustained a finding of conversion only where force, or threats of force, or risk of invoking violence, accompanied the repossession.") and *Rogers v. Allis-Chalmers Credit Corp.*, 679 F.2d 138 (8th Cir. 1982) (issue of breach of the peace was for jury).

When punitive damages are sought, *City National Bank of Fort Smith* provides language to be used in modifying the punitive damages instruction (AMI 2218) for use in a conversion case. The plaintiff must show the defendant intentionally exercised control or dominion over the plaintiff's property for the purpose of violating the plaintiff's right to the property or for the purpose of causing damages. *City Nat'l Bank of Fort Smith*, 301 Ark. at 188, 783 S.W.2d at 338. An act of conversion by itself will not support an award of punitive damages. When the defendant exercised dominion and control over the plaintiff's property based on its uncontroverted belief that it had a contract right and a power of attorney to do so, a punitive damage claim will not lie. *Huffman v. Landers Ford North, Inc.*, 100 Ark. App. 159, 164-65, 265 S.W.3d 783, 787 (2007).

Research References

West's Key Number Digest
Conversion and Civil Theft ⇨234

Legal Encyclopedias
C.J.S., TROVER AND CONVERSION §§ 120 to 121

CHAPTER 5

PROXIMATE CAUSE

Table of Instructions

AMI

- 501. Proximate Cause—Concurring Proximate Cause—Definition.
- 502. Concurring Proximate Causes—Liability—General Verdict.
- 503. Intervening Proximate Cause—Definition and Effect—Burden of Proof.

AMI 501

PROXIMATE CAUSE—CONCURRING PROXIMATE CAUSE—DEFINITION

The law frequently uses the expression “proximate cause,” with which you may not be familiar. When I use the expression “proximate cause,” I mean a cause which, in a natural and continuous sequence, produces damage and without which the damage would not have occurred.

[This does not mean that the law recognizes only one proximate cause of damage. To the contrary, if two or more causes work together to produce damage, then you may find that each of them was a proximate cause.]

NOTE ON USE

Use the second paragraph only when there is evidence that the injury may have been produced by two or more concurrent causes.

Use AMI 503 in addition to this instruction when intervening cause is an issue.

When an act of God may be a concurring cause, also use AMI 611.

COMMENT

Proximate cause exists when a negligent act leads to damages in a natural and continuous sequence, unbroken by any efficient intervening cause. *Kubik v. Igleheart*, 280 Ark. 310, 311–12, 657 S.W.2d 545, 546 (1983). For an injury to be the natural and probable consequence of an act, the consequence of the act might and ought to have been foreseen by the defendant as likely to flow from that act and the act must, in a natural and continuous sequence unbroken by any new cause, operate as the cause of injury. *Ben M. Hogan & Co. v. Krug*, 234 Ark. 280, 285, 351 S.W.2d 451, 454–55 (1961). Foreseeability is an element in determining whether a person is negligent and has nothing to do with proximate cause. Negligence must proximately cause a given result in order to justify a finding of negligence or contributory negligence, but negligence and proximate cause are two separate and independent legal concepts. *Collier v. Citizens Coach Co.*, 231 Ark. 489, 492, 330 S.W.2d 74, 76 (1959). The question of proximate cause, given negligence, is more often than not a question of fact, to be determined by viewing attendant circumstances, and proximate cause may be shown by circumstantial evidence. *St. Louis Sw. Ry. Co. v. Pennington*, 261 Ark. 650, 662, 553 S.W.2d 436, 441 (1977).

It is error to delete the bracketed paragraph when there is substantial evidence that the injury may have been produced by two or more concurring causes, *Blythe v. Byrd*, 251 Ark. 363, 364, 472 S.W.2d 717, 718 (1971), unless the error is rendered harmless by other circumstances. In *Davis v. Davis*, 313 Ark. 549, 856 S.W.2d 284 (1993), the failure to give the instruction on multiple proximate causes was rendered harmless by the giving of a comparative fault instruction, which contemplated the comparison of two causes of an accident and the negligence associated with each. In *Smith v. Goble*, 248 Ark. 415, 452 S.W.2d 336 (1970), the failure to give an instruction allowing the jury to find more than one proximate cause was rendered harmless by instructions requiring the jury to find that an automobile brake was not defective or that, if it was defective, the defect was not a proximate cause of the accident before the jury could find in favor of the manufacturer and against the driver.

In some opinions the fact that the defendant could or should have foreseen the injury has been mentioned in the definition of proximate cause. *Booth & Flynn v. Price*, 183 Ark. 975, 980, 39 S.W.2d 717, 720 (1931); *Wis. & Ark. Lumber Co. v. Scott*, 153 Ark. 65, 72, 239 S.W. 391, 392 (1922). This fact, however, is omitted in the instruction defining proximate cause because it is properly part of the definition of negligence. *Hartsock v. Forsgren, Inc.*, 236 Ark. 167, 169, 365 S.W.2d 117, 118 (1963) (citing *Collier*, 231 Ark. 489, 330 S.W.2d 74).

Proximate cause may be shown from circumstantial evidence. *White River Rural Water Dist. v. Moon*, 310 Ark. 624, 627, 839 S.W.2d 211, 212 (1992).

In 2003, Ark. Code Ann. § 16-55-202 was amended to provide that, with respect to all affected causes of action accruing on or after March 25, 2003, the fault of non-parties can be considered in assessing percentages of fault when either the plaintiff has entered into a settlement agreement with a non-party or when a defendant files the statutory 120-day notice prior to trial that a non-party was wholly or partially at fault. In *Johnson v. Rockwell Automation, Inc.*, 2009 Ark. 241, 308 S.W.3d 135, however, the Arkansas Supreme Court ruled that Ark. Code Ann. § 16-55-202 contravenes the separation of powers provisions of the Arkansas Constitution, Article 4, § 2 and Amendment 80, § 3, by effectively establishing a procedure for litigating the fault of non-parties "that conflicts with our 'rules of pleadings, practice and procedure.'" *Johnson*, 2009 Ark. 241, at 6 (quoting Amendment 80, § 3). The court held both subsections 202(a) and (b) unconstitutional. *Id.* at 8.

Johnson thus restored the law on non-party fault to its previous status, under which, pursuant to Ark. Code Ann. § 16-64-122(a), the jury is not permitted to assign a percentage of fault to a person who is not a party to the suit. *See also McCoy v. Augusta Fiberglass Coatings, Inc.*, 593 F.3d 737, 743-44 (8th Cir. 2010) (ruling that *Johnson* mooted claim to apportionment of fault to non-party because law reverted to what it was before passage of 2003 amendment to Ark. Code Ann. § 16-55-202).

It is proper to give AMI 501 and 502 where the defendant contends that a non-party is the sole proximate cause of the plaintiff's damages. *Belz-Burrows L.P. v. Cameron Constr. Co.*, 78 Ark. App. 84, 78 S.W.3d 126 (2002).

The "frequency, regularity, and proximity" test was adopted for asbestos cases in *Chavers v. General Motors Corp.*, 349 Ark. 550, 79 S.W.3d 361 (2002).

Research References

West's Key Number Digest
Negligence ⇨1740

Legal Encyclopedias
C.J.S., Negligence §§ 995, 1002, 1008 to 1009, 1016

AMI 502

**CONCURRING PROXIMATE CAUSES—LIABILITY—
GENERAL VERDICT**

When the [*negligent*] acts or omissions of two or more persons work together as proximate causes of damage to another, each of those persons may be found to be liable. This is true regardless of the relative degree of fault between them. [If you find that (*negligence*) (*or*) (*intentional wrongdoing*) (*or*) (_____) of the defendant(s) proximately caused damage to the plaintiff, it is not a defense to liability that some other person may also have been to blame.]

NOTE ON USE

Do not use this instruction when the case is submitted on interrogatories. *Oates v. St. Louis Southwestern R. Co.*, 266 Ark. 527, 587 S.W.2d 10 (1979).

The bracketed word “negligent” should be used when the case involves negligence only, with no issue of another type of fault.

The last sentence should be used only when some person who may also have been at fault is not a party to the action. When there are multiple parties it may be necessary to substitute other language in the last sentence for the references to the plaintiff and the defendant.

Use AMI 501 in addition to this instruction when there is evidence that the conduct of a third person, not a party to the suit, may have been a proximate cause of the plaintiff's damage. *Beevers v. Miller*, 242 Ark. 541, 414 S.W.2d 603 (1967).

COMMENT

This instruction was approved as a correct statement of law in *Benson v. Temple Inland Forest Products Corp.*, 328 Ark. 214, 942 S.W.2d 252 (1997).

This instruction is not warranted when plaintiff's negligent act did not lead in a natural and continuous sequence, unbroken by any efficient intervening cause, to the defendant's intentional act that caused plaintiff's injuries. *Kubik v. Igleheart*, 280 Ark. 310, 657 S.W.2d 545 (1983). In cases of comparative negligence, the negligence of the plaintiff

and that of the defendant are concurring proximate causes. *St. Louis Southwestern Ry. Co. v. Pennington*, 261 Ark. 650, 553 S.W.2d 436 (1977).

A modification of this instruction which overly emphasized that the negligence of a third party could not be imputed to the plaintiff was disapproved in *Chicago, R. I. & P. R. Co. v. Hughes*, 250 Ark. 526, 467 S.W.2d 150 (1971).

In 2003, Ark. Code Ann. § 16-55-202 was amended to provide that with respect to all affected causes of action accruing on or after March 25, 2003, the fault of non-parties can be considered in assessing percentages of fault when either the plaintiff has entered into a settlement agreement with a non-party or when a defendant files the statutory 120-day notice prior to trial that a non-party was wholly or partially at fault. In *Johnson v. Rockwell Automation, Inc.*, 2009 Ark. 241, 308 S.W.3d 135, however, the Arkansas Supreme Court ruled that Ark. Code Ann. § 16-55-202 contravenes the separation of powers provisions of the Arkansas Constitution, Article 4, § 2 and Amendment 80, § 3, by effectively establishing a procedure for litigating the fault of non-parties “that conflicts with our ‘rules of pleadings, practice and procedure.’” *Johnson, supra*, 2009 Ark. 241, at 6 (quoting Amendment 80, § 3). The court held both subsections 202(a) and (b) unconstitutional. *Id.* at 8. See also *McCoy v. Augusta Fiberglass Coatings, Inc.*, 593 F.3d 737, 743–44 (8th Cir. 2010) (ruling that *Johnson* mooted claim to apportionment of fault to non-party because law reverted to what it was before passage of 2003 amendment to Ark. Code Ann. § 16-55-202).

Johnson thus restored the law on non-party fault to its previous status, under which, pursuant to Ark. Code Ann. § 16-64-122(a), the jury is not permitted to assign a percentage of fault to a person who is not a party to the suit; but it is proper to give AMI 501 and 502 where the defendant contends that a non-party is the sole proximate cause of the plaintiff's damages. *Belz-Burrows L.P. v. Cameron Constr. Co.*, 78 Ark. App. 84, 78 S.W.3d 126 (2002).

Research References

West's Key Number Digest
Negligence ⇨1740

Legal Encyclopedias
C.J.S., Negligence §§ 995, 1002, 1008 to 1009, 1016

AMI 503

INTERVENING PROXIMATE CAUSE—DEFINITION
AND EFFECT—BURDEN OF PROOF

 contends and has the burden of proving
(Defendant)
that following any act or omission on [his][her][its]
part an event intervened that in itself caused damage
completely independent of [his][her][its] conduct. If
you so find, then act or omission was not a
(defendant's)
proximate cause of any damage resulting from the
intervening event.

[The fact that other cause(s) intervened between
any act or omission on the part of , and the
(defendant)
damage for which claim is made, would not relieve
 of liability if the damage is reasonably fore-
(defendant)
seeable as a natural and probable result of any act or
omission on the part of .]
(defendant)

NOTE ON USE

This instruction should be given when there is evidence of efficient
intervening cause.

Use the second paragraph when there is evidence that the damage
was a reasonably foreseeable, natural, and probable result of the origi-
nal conduct.

COMMENT

This instruction was approved as a correct statement of law in
Benson v. Temple Inland Forest Products Corp., 328 Ark. 214, 942
S.W.2d 252 (1997).

It was proper to give this instruction when there was a question of
fact as to whether the act of another driver causing damage was an
intervening act independent of the act or omission of the defendant
driver. If so, then the act or omission of the defendant was not a

proximate cause of damage to the plaintiff. *Boyd v. Reddick*, 264 Ark. 671, 573 S.W.2d 634 (1978). Separate wrongs done by an independent agent can be an intervening proximate cause and cannot be joined together to increase the responsibility of another wrongdoer, as a party is liable only to the extent to which that party's own acts have caused injury. *Bill C. Harris Const. Co. Inc. v. Powers*, 262 Ark. 96, 554 S.W.2d 332 (1977). In order to have sufficient evidence to support a finding of proximate cause it is not necessary that circumstantial evidence exclude a concurring efficient proximate cause as distinguished from a totally independent and unrelated cause. *St. Louis Southwestern Ry. Co. v. Pennington*, 261 Ark. 650, 553 S.W.2d 436 (1977).

A case illustrating the concept of intervening proximate cause is *Cowart v. Casey Jones Contractor, Inc.*, 250 Ark. 881, 467 S.W.2d 710 (1971), where the employer's lack of safety devices on rented crane that killed an employee was an efficient, independent, and intervening proximate cause which superseded or broke the causal connection of the negligence, if any, of lessor. In *Hill v. Wilson*, 216 Ark. 179, 224 S.W.2d 797 (1949), however, the court found that when the intervening act of a person is in the form of a normal response to the stimulus of a situation created by a defendant's negligent conduct, it is not a superseding cause of harm to another when the defendant's conduct is a substantial factor in bringing about such harm. Likewise, in *Rhoads v. Service Machine Co.*, 329 F. Supp. 367 (E.D. Ark. 1971), if the intervening cause is foreseeable to the original actor or where his conduct substantially increases the likelihood of the intervening cause occurring, the original negligent conduct is still a "proximate cause" of the injury and the original actor remains liable. In *Belz-Burrows, L.P. v. Cameron Const. Co.*, 78 Ark. App. 84, 78 S.W.3d 126 (2002), the court reaffirmed the rule that the defendant has the burden of proving that, following any act or omission, an event intervened that in itself caused damage completely independent of his or her conduct. For an excellent historical perspective of intervening causes and tort law in Arkansas, see Comment, 1 Ark.L. Rev. 148 (1947).

For an instructive discussion of when a subsequent cause is not an intervening cause, see *Hill, supra*. The fact that other causes intervene between original act of negligence and injury for which recovery is sought is not sufficient to relieve original actor of liability if injury is a natural and probable consequence of the original negligent act or omission and was reasonably foreseeable. *Stecker v. First Commercial Trust Co.*, 331 Ark. 452, 962 S.W.2d 792 (1998); see also *Burns v. Boot Scooters, Inc.*, 61 Ark. App. 124, 965 S.W.2d 798 (1998).

In some instances, the issue of intervening proximate causation may be a question of law. *Wilson v. Evans*, 284 Ark. 101, 679 S.W.2d 205 (1984). However, it is usually a question of fact where the jury must decide if the plaintiff's injury would not have occurred except for the act of the intervening agent totally independent of acts constituting the primary negligence. *Larson Mach., Inc. v. Wallace*, 268 Ark. 192, 600 S.W.2d 1 (1980). In *Carroll Elec. Coop. Corp. v. Carlton*, 319 Ark.

555, 892 S.W.2d 496 (1995), overruled on other grounds by *Hartford Fire Ins. Co. v. Sauer*, 358 Ark. 89, 186 S.W.3d 229 (2004), this instruction was held to have been properly given when a fire occurred in a home 14 or 15 hours after electricity had been shut off immediately following a utility pole accident, and the jury could have found that no further damage would have occurred had the power been properly restored.

The concept of intervening cause is not applicable to an intentional tort case. *City Nat. Bank of Fort Smith v. Goodwin*, 301 Ark. 182, 783 S.W.2d 335 (1990).

Research References

West's Key Number Digest
Negligence ¶1740

Legal Encyclopedias
C.J.S., Negligence §§ 871, 995, 1002, 1008 to 1009, 1016

CHAPTER 6

SPECIFIC FACTORS AFFECTING NEGLIGENCE AND DEFENSES

Table of Instructions

AMI

- 601. Violation of Statute, Ordinance, or Regulation as Evidence of Negligence.
- 602. Right to Assume Others Will Use Ordinary Care and Obey the Law.
- 603. No Presumption of Fault from Happening of Injury.
- 604. Duty to Anticipate Behavior of Children.
- 605. Responsibility to Control Minor Children.
- 606. Intoxication—Definition.
- 607. Intoxication as Negligence.
- 608. Motor Vehicle—Entrusting to Intoxicated or Incompetent Driver.
- 609. Res Ipsa Loquitur.
- 610. Res Ipsa Loquitur in Addition to Specified Acts of Negligence.
- 611. Act of God.
- 612. Attempted Rescue—Negligence.

AMI 601

VIOLATION OF STATUTE, ORDINANCE, OR REGULATION AS EVIDENCE OF NEGLIGENCE

There *[was]* *[were]* in force in the *[State of Arkansas]* *[and]* *[City of _____]* at the time of the occurrence *[a]* *[(number)]* *[statute(s)]* *[ordinance(s)]* *[regulation(s)]*, which provided:

(Quote or summarize applicable section)

[First:]

[Second:]

[Third:]

[Etc.:]

A violation of [this] [one or more of these _____] (number)

[statute(s)] [ordinance(s)] [regulation(s)], although not necessarily negligence, is evidence of negligence to be considered by you along with all of the other facts and circumstances in the case.

NOTE ON USE

If more than one statute, ordinance, or regulation is given, insert the total number to be given in the spaces marked "number."

Portions of the statute, ordinance, or regulation not applicable to the facts in the case must be deleted. *Harkrider v. Cox*, 230 Ark. 155, 321 S.W.2d 226 (1959).

Use AMI 913 and 914 in cases involving emergency vehicles.

Do not insert any statutory rule which embodies the standard of ordinary care. See AMI 901.

This identical instruction also appears as AMI 903.

COMMENT

This instruction is a correct statement of the law. *Bridgforth v. Vandiver*, 225 Ark. 702, 284 S.W.2d 623 (1955). Where supported by the evidence, it should be given. *McMickle v. Griffin*, 369 Ark. 318, 254 S.W.3d 729 (2007) (statutory requirements regarding vehicle permit, lighting, and speed).

The following are examples of situations in which it was proper to use this instruction: *Koch v. Northport Health Services of Arkansas, LLC*, 361 Ark. 192, 205 S.W.3d 754 (2005) (Code of Federal Regulations governing nursing homes); *Berkeley Pump Co. v. Reed-Joseph Land Co.*, 279 Ark. 384, 653 S.W.2d 128 (1983) (violation of Ark. Code Ann. § 4-88-107); *Franco v. Bunyard*, 261 Ark. 144, 547 S.W.2d 91 (1977) (violation of federal gun control law); *Dunn v. Brimer*, 259 Ark. 855, 537 S.W.2d 164 (1976) (OSHA safety regulation); *Bussell v. Missouri Pac. R. Co.*, 237 Ark. 812, 376 S.W.2d 545 (1964) (I.C.C. safety regulation).

Since a private right of action is now provided for in Ark. Code Ann. § 4-88-113(f) for an alleged violation of Ark. Code Ann. § 4-88-107, the Committee notes that there is a question whether the use of Section 4-88-107 with this instruction is still appropriate.

The following are examples of situations in which it was not proper to use this instruction: *Fryar v. Touchstone Physical Therapy, Inc.*, 365 Ark. 295, 229 S.W.3d 7 (2006) (unauthorized practice of chiropractic medicine); *Cincinnati Life Ins. Co. v. Mickles*, 85 Ark. App. 188, 148 S.W.3d 768 (2004) (action involving allegations of deceit); *Orsini v. Larry Moyer Trucking, Inc.*, 310 Ark. 179, 833 S.W.2d 366 (1992) (violation of the Model Rules of Professional Conduct); *Arkansas Louisiana Gas Co. v. Stracener*, 239 Ark. 1001, 395 S.W.2d 745 (1965) (violation of company rule not establishing a standard of care).

The Arkansas statute restricting admissibility in civil actions of evidence of seat-belt nonuse, Ark. Code Ann. § 27-37-703, was held unconstitutional on separation-of-powers grounds in *Mendoza v. WIS Int'l, Inc.*, 2016 Ark. 157. *Mendoza* decided only the constitutional question, certified by a federal district court, and did not rule on such evidence's admissibility. The court reasoned that the statute was a rule of evidence and hence a rule "of pleading, practice and procedure," which "falls within this court's domain," rather than a matter of substantive law for the legislature. *Id.* at 5.

Research References

West's Key Number Digest
Negligence ⇨1732

Legal Encyclopedias
C.J.S., Negligence § 995

AMI 602

**RIGHT TO ASSUME OTHERS WILL USE ORDINARY
CARE AND OBEY THE LAW**

Every person using ordinary care has a right to assume, until the contrary is or reasonably should be apparent, that every other person will *[use ordinary care]* *[and]* *[obey the law]*. To act on that assumption is not negligence.

NOTE ON USE

This instruction should only be given where there is evidence of negligence on the part of a party claiming damages.

COMMENT

This instruction was cited with approval in *St. Louis Southwestern Ry. Co. v. Evans*, 254 Ark. 762, 497 S.W.2d 692 (1973). *See also* *Rexer v. Carter*, 208 Ark. 342, 186 S.W.2d 147 (1945), which approves substantially similar language.

England v. Costa, 364 Ark. 116, 216 S.W.3d 585 (2005) held that this instruction should only be given where there is evidence of negligence on the part of a party claiming damages.

Research References

West's Key Number Digest
Negligence ⇨1720

Legal Encyclopedias
C.J.S., Negligence §§ 995 to 998, 1003 to 1007, 1010

AMI 603

**NO PRESUMPTION OF FAULT FROM HAPPENING
OF INJURY**

The fact that an *[injury]* *[collision]* *[accident]* occurred is not, of itself, evidence of *[negligence]* *[fault]* on the part of anyone.

NOTE ON USE

Do not use this instruction when Ark. Code Ann. § 27-51-503(c)(2) is applicable.

COMMENT

This instruction is a correct statement of the law. *Mahan v. Hall*, 320 Ark. 473, 897 S.W.2d 571 (1995); *Pilkington v. Riley*, 271 Ark. 746, 610 S.W.2d 570 (1981).

In some cases involving *res ipsa loquitur*, it may not be error for the court to refuse this instruction. *Lambert v. Markley*, 255 Ark. 851, 503 S.W.2d 162 (1973).

Research References

West's Key Number Digest
Negligence ⇨1722

Legal Encyclopedias
C.J.S., Negligence §§ 995, 999 to 1000

AMI 604

DUTY TO ANTICIPATE BEHAVIOR OF CHILDREN

A person who knows, or reasonably should know, that a child may be affected by *[his][her][its]* ["act," "failure to act," "conduct," etc.] is required to anticipate the ordinary behavior of children and to use care commensurate with any danger reasonably to be anticipated under the circumstances. A failure to use this degree of care is negligence.

NOTE ON USE

This instruction assumes that the party charged with negligence is a competent adult, or a minor operating a motor vehicle, and that there is evidence that the child's behavior contributed to cause the injury. If the issue is the duty of an adult toward a minor operating a motor vehicle, AMI 305 should be given instead of this instruction.

COMMENT

The court has not established definitive rules for determining whether an injured party is a child within the meaning of this instruction. However, it was error to refuse this instruction in the following cases: *Thomas v. Newman*, 262 Ark. 42, 553 S.W.2d 459 (1977) (13-year-old pedestrian); *Holcomb v. Gilbraith*, 257 Ark. 32, 513 S.W.2d 796 (1974) (a minor between 14 and 15); *Moore v. Rye*, 255 Ark. 469, 500 S.W.2d 751 (1973) (13-month-old infant).

This instruction is directed only to a duty imposed in the operation of a motor vehicle. *Moses v. Bridgeman*, 355 Ark. 460, 139 S.W.3d 503 (2003).

Research References

West's Key Number Digest
Negligence Ⓒ1720

Legal Encyclopedias
C.J.S., Negligence §§ 995 to 998, 1003 to 1007, 1010

AMI 605

RESPONSIBILITY TO CONTROL MINOR CHILDREN

If a parent has the opportunity and ability to control a minor child and has knowledge of the child's tendency to commit acts which could normally be expected to cause injury to others, ordinary care requires the parent to exercise reasonable means to control the child.

COMMENT

Harvey v. Shaver, 247 Ark. 92, 444 S.W.2d 256 (1969) (Parents may be responsible for leaving fireworks in an unlocked utility room, which eleven-year-old son discharged, causing injury to plaintiff's son). Williams v. Davidson, 241 Ark. 699, 409 S.W.2d 311 (1966) (Parent may be responsible when he left in an unlocked closet a BB gun which his son had misused in the past). Bieker v. Owens, 234 Ark. 97, 350 S.W.2d 522 (1961) (Parents are required to exercise reasonable care over reckless and malicious conduct of a son).

See AMI 801 for the statutory rule of parental liability for property damage caused by the willful or malicious conduct of a minor.

Research References

West's Key Number Digest

Parent and Child §370

Legal Encyclopedias

C.J.S., Parent and Child §§ 333 to 335

AMI 606

INTOXICATION—DEFINITION

A person is intoxicated when [he][she] is influenced or affected by the ingestion of alcohol, a controlled substance, any intoxicant, or combination thereof, to such a degree that [his][her] reactions, motor skills, and judgment are substantially altered and, as a result, [he][she] constitutes a clear and substantial danger of physical injury or death to [himself][herself] and others.

COMMENT

This instruction is based on the current statutory definition of "intoxication" set forth in the chapter of the Arkansas Criminal Code concerning driving while intoxicated, Ark. Code Ann. § 5-65-102. Upon review, the Committee concluded that the previous AMI 606 required updating. That language tracked the definition approved in a prosecution for driving while intoxicated, *Jones v. Forrest City*, 239 Ark. 211, 218, 388 S.W.2d 386, 390 (1965). As explained in the Comment in earlier AMI editions, the previous definition stood on shaky ground. Most importantly, dicta in a subsequent case, *Erwin v. Allied Van Lines, Inc.*, 240 Ark. 593, 594, 401 S.W.2d 25, 25-26 (1966), cast doubt on its viability. Rather than challenge the intoxication instructions given (which were similar, but apparently not identical, to those given in *Jones* and former AMI 607 (now AMI 606)), the appellant in *Erwin* contended that they were not justified by the evidence. After finding ample evidence for submission of the issue of intoxication, the court stated, "*While we do not wish to approve the cumbersome instruction for future use . . . we find the instruction objected to was not prejudicial.*" 240 Ark. at 594, 401 S.W.2d at 26 (emphasis added). In response to appellant's criticism of the AMI definition of intoxication, the court said, "We do not now examine this AMI instruction, for it was not given in the trial court. We may appropriately observe, however, that this court has not given its blanket advance approval to the Arkansas model instructions." *Id.*, 401 S.W.2d at 26. The court observed that its per curiam order "simply gave effect to the work of the committee by directing that its instructions be used unless the trial court should find that they do not accurately state the law." *Id.*, 401 S.W.2d at 26. Nothing in *Erwin*, however, calls into question the proposition that the civil definition of intoxication should follow the criminal definition. The Committee therefore concluded that the legislature's current formulation should form the basis for the instruction.

Research References*West's Key Number Digest*

Alcoholic Beverages ⑈1197 to 1199; Automobiles ⑈246(16); Negligence ⑈1720

Legal Encyclopedias

C.J.S., Intoxicating Liquors §§ 872, 874; Motor Vehicles §§ 1450, 1469, 1494; Negligence §§ 995 to 998, 1003 to 1007, 1010

AMI 607

INTOXICATION AS NEGLIGENCE

Whether a person involved in the occurrence was intoxicated at the time is a proper question for you to consider together with other facts and circumstances in evidence in determining whether *[he][she]* was negligent. Intoxication is no excuse for failure to act as a reasonably careful person would act. An intoxicated person is held to the same standard of care as a sober person.

COMMENT

See *Chicago, R.I. & P. Ry. Co. v. Houston*, 209 Ark. 217, 189 S.W.2d 904 (1945) ("the fact that a person is intoxicated when injured does not, of itself, show such contributory negligence as will defeat his recovery for such injury, but is a circumstance which may be considered in determining whether he was contributorily negligent.").

Research References

West's Key Number Digest
Negligence ¶1720

Legal Encyclopedias
C.J.S., Negligence §§ 995 to 998, 1003 to 1007, 1010

AMI 608

NEGLIGENT ENTRUSTMENT

If you find that _____ was negligent [*committed*
(Entrustee)
(insert the intentional tort)], you must also consider
 _____ claim that _____ was negligent in entrusting
(Plaintiffs) (Defendant)
 the _____ to _____ has the
(insert name of instrumentality) (Entrustee) (Plaintiff)
 burden of proving each of the following five essential
 propositions:

First, that _____ [owned] [or] [controlled] [a mo-
(Defendant)
 tor vehicle] [or] [*insert instrumentality*];

Second, that _____ permitted _____ to [drive]
(Defendant) (entrustee)
 [operate] [or] [use] the _____;
(instrumentality)

Third, that _____ knew or reasonably should
(Defendant)
 have known that _____ was [impaired] [incompetent]
(entrustee)
 [*inexperienced*] [*reckless*] [*intoxicated*] [or] [*insert ap-
 plicable condition*];

Fourth, that the entrustment created an unrea-
 sonable risk of harm to others; and

Fifth, that _____ negligence proximately caused
(Defendant's)
 _____ damages.
(Plaintiffs)

[If you find that each of these five propositions
 has been proved, then your verdict should be for
 _____; but if, on the other hand, you find that any of
(Plaintiff)
 these propositions has not been proved, then your

verdict should be for .]
(Defendant)

NOTE ON USE

This instruction is to be used to determine the entrustor's negligence. Negligent entrustment arises from the combined fault of the entrustor in providing the instrumentality and the entrustee in operating it. This instruction assumes that the entrustee is a party and his or her fault has been determined.

If the entrustee is not a defendant, the underlying tort of the entrustee should nevertheless be determined by the court or jury. If it is determined by the jury, the following elements may be added to the instruction, and the paragraphs should be renumbered:

[[First], that (*Plaintiff*) has sustained damages;]

[[Fourth], that (*entrustee*) was negligent [committed (intentional tort) in [driving] [operating] [using] the (*instrumentality*) and that [his] [her] negligence [such conduct] was a proximate cause of (*plaintiff's*) damages;]

In instances where the liability of the entrustee is admitted or determined before trial, AMI 210 or a stipulation may be given.

If the case is submitted on interrogatories, the first sentence of this instruction should be replaced with the following:

If an interrogatory directs, you must consider (*Plaintiff's*) claim that (*Defendant*) was negligent in entrusting the (*insert name of instrumentality*) to (*Entrustee*).

Do not use the bracketed last paragraph if the case is submitted on interrogatories.

COMMENT

The elements of a negligent entrustment claim were set out in *Arkansas Bank & Trust Co. v. Erwin*, 300 Ark. 599, 603, 781 S.W.2d 21 (1989). They are: (1) proof the entrustee was incompetent, inexperienced or reckless; (2) the entrustor knew or had reason to know of the entrustee's condition or proclivities; (3) there was an entrustment of the chattel; (4) the entrustment created an appreciable risk of harm to the plaintiff and a relational duty on the part of the defendant; and (5) the harm to the plaintiff was proximately or legally caused by the negligence of the defendant. *Id.* The duty on the part of the entrustor arises with knowledge of the entrustee's proclivities and the risk thereby created in placing the instrumentality in his or her hands. *Pace v. Davis*, 2012

Ark. App. 193 at 4 (affirming summary judgment for defendant involving entrustment of a firearm because there was a failure of proof on the first and second elements).

The claim of negligent entrustment arises from the combined negligence of the owner/provider of the dangerous instrumentality in entrusting it to the operator and of the operator in its operation. *Chaney v. Duncan*, 194 Ark. 1076, 1083, 110 S.W. 2d 21, 23 (1937) (Entrustor's liability rests not on master-servant or principal-agent, but on permissive use by a known incompetent.).

For discussion of the claim for negligent entrustment, see *Mills v. Crone*, 63 Ark. App. 45, 973 S.W.2d 828 (1998) (finding no negligent entrustment of motor vehicle to a reckless driver because defendants did not control its use); *Balentine v. Sparkman*, 327 Ark. 180, 937 S.W.2d 647 (1997) (upholding plaintiff's verdict on negligent entrustment of a motor vehicle to an intoxicated driver); *Ponder v. Gorman*, 94 Ark. App. 159, 227 S.W.2d 428 (2006) (affirming summary judgment for defendant on grounds that there was insufficient evidence of entrustee's incompetence, intoxication, or recklessness); *Central Flying Service v. Crigger*, 215 Ark. 400, 405-06, 221 S.W.2d 45, 47-48 (1949) (concluding that there was insufficient evidence of causal relation between entrustee's known recklessness and accident); *Collins v. Morgan*, 92 Ark. App. 95, 102, 211 S.W.2d 14, 20 (2005) (suggesting that permission to use the instrumentality may be express or implied). See also RESTATEMENT (SECOND) OF TORTS §§ 308, 390 (1965) (stating elements and explaining "control" element).

This rule is also applicable to aircraft. *Cent. Flying Serv. v. Crigger*, 215 Ark. at 402, 221 S.W.2d at 46. See *Pace v. Davis*, 2012 Ark. App. 193, for discussion of entrustment of a firearm.

Arkansas Bank & Trust Co. v. Erwin, 300 Ark. 599, 781 S.W.2d 21 (1989), a venue case, suggests that a financial institution appointed as guardian of an incompetent may be liable as an entrustor for providing the funds to purchase an automobile.

LeClaire v. Commercial Siding and Maintenance Co., 308 Ark. 580, 826 S.W.2d 247 (1992), holds that a claim for negligent entrustment may be made against the original entrustor, when the original entrustee became intoxicated and entrusted the vehicle to a third person, unknown to the entrustor, who was driving when the injury occurred.

If a defendant employer or principal admits vicarious liability for the negligence of the employee or agent, the plaintiff may not pursue a claim for negligent entrustment, hiring, or retention against such defendant. *Elrod v. G&R Constr. Co.* 275 Ark. 151, 154, 628 S.W.2d 17, 19 (1982); *Kyser v. Porter*, 261 Ark. 351, 358, 548 S.W.2d 128, 132 (1977). The court in *Elrod* further ruled that such admission precludes a plaintiff who seeks punitive damages on a negligent entrustment theory from having evidence of the employee's or agent's bad driving record

submitted to the jury, at least absent indication that such record would put defendant on notice that its driver would commit a willful, wanton, or intentional act. 275 Ark. at 154-56, 628 S.W.2d at 18-20. *See also* Moore v. Daniel Enters., Inc., 2006 WL 1155948 (W.D. Ark. April 28, 2006) (applying *Elrod*). The plaintiff may proceed against the employer, however, for its independent acts of negligence. *See* Regions Bank v. White, 2009 WL 3148732 (E.D. Ark. Sept. 24, 2009) (plaintiff allowed to proceed on claims that the employer was itself negligent in failing to have a policy requiring the use of warning triangles behind a stopped vehicle, to adequately train drivers regarding the placement of the triangles, to have an escort vehicle, and to maintain the truck).

For an overview, *see* Henry Woods, *Negligent Entrustment Revisited*, 30 Ark. L. Rev. 288 (1976).

Research References

West's Key Number Digest
Automobiles ⚡246(16)

Legal Encyclopedias
C.J.S., Motor Vehicles §§ 1450, 1469, 1494

AMI 609

RES IPSA LOQUITUR

With respect to the question of whether _____
(defendant)
 was negligent, _____
(plaintiff)
 has the burden of proving each
 of the following *[two] [three]* essential propositions:

First: That *[the alleged injury] [the death] [or] [(the alleged) property damage]* was attributable to _____
(name of

instrumentality)
 which [was under the exclusive control of
 _____.] [had been under the exclusive control of
(defendant)

(defendant)
 without any opportunity for the *(contents)*
(character) of the _____
(instrumentality)
 to have been changed af-
 ter leaving the possession of _____.] *[and]*
(defendant).

Second: That in the normal course of events, no
[injury] [death] [or] [property damage] would have oc-
 curred if _____
(defendant)
 had used *[ordinary care] [the highest degree of care]* while the _____
(instrumentality)
 was under its
 exclusive control.

[And third: That _____
(defendant)

(instrumentality)
 owed a duty to _____
(plaintiff)
 to use *(ordinary care)*
(the highest degree of care).]

If you find that each of these *[two] [three]* proposi-
 tions has been proved, then you are permitted, but
 not required, to infer that _____
(defendant)
 was negligent.

[But if, on the other hand, you find that *[either]*

[any] of these propositions has not been proved, or if you find that _____ used [ordinary care] [the highest degree of care] in its control of the _____, then your verdict should be for _____.]

(defendant) (instrumentality) (defendant)

NOTE ON USE

Do not use the final bracketed paragraph when the case is submitted on interrogatories.

Use the third proposition only if there is a question of fact whether the defendant owed a duty of ordinary care (e.g., was the plaintiff an invitee or a trespasser).

Use the last bracketed clause in the first proposition if the instrumentality was not under the defendant's control at the time of the injury, but there is no rational ground for imputing negligence to others with respect to the instrumentality after it left the defendant's control.

When *res ipsa loquitur* is submitted along with specific acts of negligence, use AMI 610.

COMMENT

For discussions of circumstances when *res ipsa loquitur* is applicable, see *Marx v. Huron Little Rock*, 88 Ark. App. 284, 198 S.W.3d 127 (2004) (toilet seat); *Megee v. Reed*, 252 Ark. 1016, 482 S.W.2d 832 (1972) (unexplained fire); *Dollins v. Hartford Accident & Indemnity Co.*, 252 Ark. 13, 477 S.W.2d 179 (1972) (fall from hospital bed); *Prickett v. Farrell*, 248 Ark. 996, 455 S.W.2d 74 (1970) (horse on highway); and *Royal Crown Bottling Co. v. Terry*, 246 Ark. 128, 437 S.W.2d 474 (1969) (exploding bottle).

Under appropriate circumstances, *res ipsa loquitur* is applicable in medical malpractice cases. *Myers v. Cooper Clinic, P.A.*, 2011 Ark. App. 435, at 10 (doctrine inapplicable where defendant presented evidence to the contrary); *Schmidt v. Gibbs*, 305 Ark. 383, 807 S.W.2d 928 (1991) (same).

Generally, the *res ipsa loquitur* rule applies only when the instrumentality was under the exclusive control and management of the defendant at the time of the injury. *Delta Oxygen Co. v. Scott*, 238 Ark. 534, 383 S.W.2d 885 (1964); *Arkansas Power & Light Co. v. Butterworth*, 222 Ark. 67, 258 S.W.2d 36 (1953). However, this prerequisite is satisfied if there was no opportunity for the content or character of the

instrumentality to have been changed after leaving the defendant's possession. *Coca-Cola Bottling Co. of Fort Smith, Ark. v. Hicks*, 215 Ark. 803, 223 S.W.2d 762 (1949).

Once the plaintiff has established the elements of a *res ipsa loquitur* case, the burden of going forward with the evidence shifts to the defendant. However, the primary burden of proof or risk of non-persuasion remains with the plaintiff throughout the case. *Coca-Cola Bottling Co. of Helena v. Mattice*, 219 Ark. 428, 243 S.W.2d 15 (1951).

If the evidence clearly shows the precise cause of the mishap, then there is no occasion for the application of the doctrine. *Lambert v. Markley*, 255 Ark. 851, 503 S.W.2d 162 (1973).

For a discussion of the responsibility of two defendants (bottler of soft drinks and grocery store where bottler maintained and serviced a display) in control of the same instrumentality, see *Stalter v. Coca-Cola Bottling Co. of Arkansas*, 282 Ark. 443, 669 S.W.2d 460 (1984).

The doctrine of *res ipsa loquitur* is not applicable to slip and fall cases. *Alexander v. Town and Country Discount Foods, Inc.*, 316 Ark. 446, 872 S.W.2d 390 (1994).

When there is no substantial evidence of negligence on the plaintiff's part and the issue of comparative fault should not be presented to the jury, a *res ipsa loquitur* instruction may be appropriate under the circumstances of the case. *Marx v. Huron Little Rock*, 88 Ark. App. 284, 198 S.W.3d 127 (2004).

For a discussion of other instances when *res ipsa loquitur* is not applicable, see *National Bank of Commerce v. Quirk*, 323 Ark. 769, 918 S.W.2d 138 (1996), mandate amended, 325 Ark. 31, 922 S.W.2d 717 (1996); *Taylor v. Riddell*, 320 Ark. 394, 896 S.W.2d 891 (1995); *Phillips v. Elwood Freeman Co.*, 294 Ark. 548, 745 S.W.2d 127 (1988).

Research References

West's Key Number Digest

Negligence ⇨1723

Legal Encyclopedias

C.J.S., Negligence §§ 995, 999 to 1000

AMI 610

RES IPSA LOQUITUR IN ADDITION TO SPECIFIED ACTS OF NEGLIGENCE

In addition to the rules of law that I have just stated with respect to [(ordinary care) (and) (negligence) (and) (the rules of the road) (and) (———)], there are situations in which a jury may, but is not required to, draw an inference of negligence from the manner in which the [alleged injury] [death] [or] [(alleged) property damage] occurred. _____ contends (Plaintiff) that this case involves such a situation and has the burden of proving each of [two] [three] essential propositions:

First: That the [alleged injury] [death] [or] [(alleged) property damage] was attributable to _____ (name of instrumentality), which [was under the exclusive control of _____.] [had been under the exclusive control of (defendant) _____ without any opportunity for the (contents) (defendant) (character) of the _____ to have been changed after leaving the possession of _____.] (instrumentality) (defendant)

Second: That in the normal course of events, no [injury] [death] [or] [property damage] would have occurred if _____ had used [ordinary care] [the highest (defendant) degree of care] while the _____ was under its (instrumentality) exclusive control.

[And third: That _____ in its control of the
(defendant)
_____ owed a duty to _____ to use (*ordinary care*)
(instrumentality) (plaintiff)
(*the highest degree of care*).]

If you find that each of these [two] [three] propositions has been proved, then you are permitted, but not required, to infer that was negligent.
(defendant)

NOTE ON USE

This instruction, rather than AMI 609, should be used when specific acts of negligence are submitted with *res ipsa loquitur*.

Use the third paragraph only if there is a question of fact whether the defendant owed a duty of ordinary care (e.g., was the plaintiff an invitee or a trespasser).

Use the last bracketed clause in the first proposition if the instrumentality was not under the defendant's control at the time of the injury, but there is no rational ground for imputing negligence to others with respect to the instrumentality after it left the defendant's control.

COMMENT

Specific acts of negligence may be submitted with *res ipsa loquitur*.
Moon Distributors, Inc. v. White, 245 Ark. 627, 434 S.W.2d 56 (1968).

If the evidence clearly shows the precise cause of the mishap, then there is no occasion for the application of the doctrine. *Lambert v. Markley*, 255 Ark. 851, 503 S.W.2d 162 (1973).

Under appropriate circumstances, *res ipsa loquitur* is applicable in medical malpractice cases. *Myers v. Cooper Clinic, P.A.*, 2011 Ark. App. 435, at 10 (doctrine inapplicable where defendant presented evidence to the contrary); *Schmidt v. Gibbs*, 305 Ark. 383, 807 S.W.2d 928 (1991) (same).

When there is no substantial evidence of negligence on the plaintiff's part and the issue of comparative fault should not be presented to the jury, a *res ipsa loquitur* instruction may be appropriate under the circumstances of the case. *Marx v. Huron Little Rock*, 88 Ark. App. 284, 198 S.W.3d 127 (2004).

For a discussion of other instances when *res ipsa loquitur* is not ap-

plicable, *see* National Bank of Commerce v. Quirk, 323 Ark. 769, 918 S.W.2d 138 (1996), mandate amended, 325 Ark. 31, 922 S.W.2d 717 (1996); Taylor v. Riddell, 320 Ark. 394, 896 S.W.2d 891 (1995).

Research References

West's Key Number Digest

Negligence Ⓒ1723

Legal Encyclopedias

C.J.S., Negligence §§ 995, 999 to 1000

AMI 611

ACT OF GOD

An act of God means a violent disturbance of the elements such as a storm, a tempest, or a flood.

[A person is not liable to another whose damages were caused solely by an act of God. If an act of God concurs with the (*negligence*) (*fault*) of man to proximately cause damages, the (*negligence*) (*fault*) is not excused by the act of God.]

NOTE ON USE

Omit the bracketed paragraph when the case is submitted on interrogatories.

COMMENT

See *Arkansas Valley Elec. Co-op. Corp. v. Davis by Davis*, 304 Ark. 70, 800 S.W.2d 420 (1990) and *Tinsley v. Cross Development Co.*, 277 Ark. 306, 642 S.W.2d 286 (1982), discussing an act of God and the fault of man as concurring proximate causes.

See generally PROSSER AND KEETON, *THE LAW OF TORTS*, 314, 316 (Fifth Ed. 1984).

Research References

West's Key Number Digest
Negligence ¶1740

Legal Encyclopedias
C.J.S., Negligence §§ 995, 1002, 1008 to 1009, 1016

AMI 612

ATTEMPTED RESCUE—NEGLIGENCE

A person acting under stress in response to humanitarian impulses, in attempting to rescue another who reasonably appears to be in danger of substantial injury or loss of life, is not chargeable with negligence because *[his][her]* conduct may now appear to have been unwise, unless *[his][her]* conduct was rash and reckless. *[He][She]* is required to use only that degree of care a reasonably careful person would use under the same or similar circumstances.

Whether _____ was acting under such stress
(defendant)
and whether *[he][she]* used the degree of care required of *[him][her]* is for you to decide.

COMMENT

This instruction should not be given unless evidence is presented for an apparent danger of substantial injury. *Johnson Timber Corp. v. Sturdivant*, 295 Ark. 622, 752 S.W.2d 241 (1988).

An actual danger is not required to justify the instruction. If a person reasonably appears to be in danger of substantial injury, the instruction is justified. *Price v. Watkins*, 283 Ark. 502, 678 S.W.2d 762 (1984).

Research References

West's Key Number Digest
Negligence ¶1726

Legal Encyclopedias
C.J.S., Negligence §§ 995, 1004 to 1005, 1013

CHAPTER 7

AGENCY—EMPLOYMENT—PARTNERSHIP— JOINT ENTERPRISE—IMPUTED LIABILITY

Table of Instructions

AMI

- 701. Agent—Employee—Definition.
- 702. Scope of Authority—Scope of Employment—Definition.
- 703. Scope of Employment—Employee Driving Employer's Vehicle.
- 704. Agency—Employment—Deviation from Route.
- 705. Agency—Owner a Passenger in Vehicle.
- 706. Agency—Minor Driver's Parent a Passenger.
- 707. Agent or Independent Contractor.
- 707A. Borrowed Servant.
- 708. Inherently Dangerous Work—Imputed Conduct—Independent Contractor.
- 709. Liability of Employer for Employment of Incompetent Independent Contractor.
- 709A. Issues—Liability of Employer for Negligent Hiring, Supervision, or Retention of Employee
- 710. Partnership—Definition.
- 711. Partnership—Tests of Existence of Relationship.
- 712. Joint Enterprise—Definition and Effect.
- 713. Issues—Acting in Concert.
- 714. Issues—Civil Conspiracy

AMI 701

AGENT—EMPLOYEE—DEFINITION

An *[agent]* *[employee]* is a person who, by agreement with another called the *[principal]* *[employer]*, acts for the *[principal]* *[employer]* and is subject to *[his]**[her]**[its]* control. The agreement may be oral or

written or implied from the conduct of the parties and may be with or without compensation.

If one person has the right to control the actions of another at a given time, the relationship of [*principal and agent*] [*employer and employee*] may exist at that time, even though the right to control may not actually have been exercised.

NOTE ON USE

If the jury must determine whether certain alleged misconduct is to be imputed to a party because of the possible existence of an agency or employment relationship, AMI 207 should be given. On the other hand, if the relationship permitting the imputation of conduct is admitted, use AMI 208.

Use AMI 707 if the jury is to decide whether a person was an agent or an independent contractor.

COMMENT

The following cases discuss the issue of the right to control: One neighbor mowing another neighbor's yard did not create a principal-agent relationship. The right to control was not established. There is a marked difference between the authority of one to stop another from doing the work, and one's authority to control the exact manner in which the other goes about the task. *Taylor v. Gill*, 326 Ark. 1040, 934 S.W.2d 919 (1996). It was error for the trial court to find an agency relationship as a matter of law because the evidence was conflicting as to whether one had control over the use of the automobile or had relinquished control to another. *Crouch v. Twin City Transit*, 245 Ark. 778, 434 S.W.2d 816 (1969).

For issues regarding borrowed servants, see AMI 707A.

The following cases discuss relationships in which agency was at issue: The mere fact that the parent owned the vehicle which the eighteen-year-old child was driving at the time of the accident does not justify a jury instruction on the issue of an agency relationship between the two. *McMahan v. Berry*, 319 Ark. 88, 890 S.W.2d 242 (1994). A physician may be found to be an agent or employee of a for-profit clinic or hospital where he practices. *Medi-Stat, Inc. v. Kusturin*, 303 Ark. 45, 792 S.W.2d 869 (1990). Negligence of a bailee is not imputable to the bailor. A bailee occupies a different position from that of an agent or employee. *Bill C. Harris Const. Co. Inc. v. Powers*, 262 Ark. 96, 554

S.W.2d 332 (1977). When the owner of a vehicle asks another person to drive the vehicle for him to a certain place, and the other person complies with the request and is on the prescribed route, the driver is acting as the agent of the owner and not as a bailee of the vehicle as a matter of law. *Campbell v. Bastian*, 236 Ark. 205, 365 S.W.2d 249 (1963).

While a corporation in the proper case might be held liable for the acts or omissions of its corporate officers under a theory of respondeat superior, a corporate officer may not be held individually liable for harm done by a corporation unless personally involved in the events surrounding the injury. *Bayird v. Floyd*, 2009 Ark. 455, 308 S.W.3d 142 (affirming summary judgment in favor of corporate officer; general allegations of officer's responsibility for overall corporate philosophy, unsupported by specific facts showing direct personal involvement in incident, held insufficient); *McGraw v. Weeks*, 326 Ark. 285, 930 S.W.2d 365 (1996) (holding that evidence was sufficient to make out a jury question that farm manager was personally involved in alleged tortious actions); *Cash v. Carter*, 312 Ark. 41, 847 S.W.2d 18 (1993) (holding that plaintiff failed to present evidence that corporate officer was personally involved in events of injury).

Research References

West's Key Number Digest

Labor and Employment ◊3106(2); Principal and Agent ◊194(1)

Legal Encyclopedias

C.J.S., Agency § 602

AMI 702

SCOPE OF AUTHORITY—SCOPE OF
EMPLOYMENT—DEFINITION

I have used the term “scope of [authority] [employment]” in these instructions.

An [agent] [employee] is acting within the scope of [his][her] [authority] [employment] if [he][she] is engaged in the transaction of business which has been assigned to [him][her] by [his][her] [principal] [employer] or if [he][she] is doing anything which may reasonably be said to have been contemplated as a part of [his][her] [authority] [employment] and is in furtherance of [his][her] [principal's] [employer's] interests, [even though it was not expressly authorized] [and may have been specifically forbidden].

COMMENT

This instruction is a correct statement of the law. *Nipper v. Brandon Co.*, 262 Ark. 17, 553 S.W.2d 27 (1977).

The acts or omissions charged as negligence against the servant were not acts or omissions occurring in the scope of the servant's employment; therefore, no claim was asserted against the principal. *White v. Sims*, 211 Ark. 499, 201 S.W.2d 21 (1947). The test of a master's liability for his servant's negligence is not whether the negligent act was committed while the servant was in his employ, but whether it was committed at a time when the servant was performing an act in furtherance of the master's business or in line with the servant's duty. *Davis v. Kukar*, 235 Ark. 139, 357 S.W.2d 275 (1962). In *Kincaid v. Taylor*, 247 Ark. 205, 445 S.W.2d 67 (1969), the employee owned the truck cab, and the employer owned the trailer; and under their business arrangement, the tractor-trailer combination was a unit under the employer's control. An accident occurred when the employee was driving the unit home for the night, but he was still within the course and scope of his employment.

The rules in worker's compensation cases on “arising out of and in the course of employment” are not determinative in master-servant cases involving the scope of employment. *Van Dalsen v. Inman*, 238 Ark. 237, 379 S.W.2d 261 (1964).

For the rule that express authorization is unnecessary, see *Rex Oil Corp. v. Crank*, 183 Ark. 819, 38 S.W.2d 1093 (1931); *American Ry. Express Co. v. Mackley*, 148 Ark. 227, 230 S.W. 598 (1921); and *Healey v. Cockrill*, 133 Ark. 327, 202 S.W. 229 (1918). For the rule that an employer may be liable even where the act may have been expressly forbidden if the act is in furtherance of the employer's business, see *Wood v. Central Ark. Milk Producers Ass'n*, 233 Ark. 958, 349 S.W.2d 811 (1961).

An employer may also be liable for an employee's unauthorized, intentional conduct if the conduct was expected in view of the employee's job duties. See *Life & Cas. Ins. Co. of Tenn. v. Padgett*, 241 Ark. 353, 407 S.W.2d 728 (1966) (holding employer was liable for assault that occurred during employee's efforts to collect money on behalf of employer because the conduct was expectable). However, in *Cannady v. St. Vincent Infirmary Med. Ctr.* 2018 Ark. 35, 537 S.W.3d 259 (2018), the defendant-hospital was found not liable for employees' improper accessing of a patient's medical records because the misconduct was not expected. The court reasoned that the hospital was entitled to expect its employees "to obey hospital policy, to remain faithful to their agreements, and to not violate federal law."

Research References

West's Key Number Digest

Labor and Employment Ⓒ3106(3); Principal and Agent Ⓒ194(2)

Legal Encyclopedias

C.J.S., Agency § 804

AMI 703

SCOPE OF EMPLOYMENT—EMPLOYEE DRIVING
EMPLOYER'S VEHICLE

A. The vehicle driven by _____ was owned by _____
(driver)
_____ and _____ was a regular employee of _____.
(employer) (driver) (employer)
Therefore, _____ has the burden to prove that _____
(employer) (driver)
was *not* acting within the scope of *[his][her]* employ-
ment at the time of the occurrence.

B. If you find that the vehicle being driven by _____
_____ was owned by _____ and that _____ was a
(driver) (alleged employer) (driver)
regular employee of _____, then _____ has the
(alleged employer) (employer)
burden to prove that _____ was *not* acting within the
(driver)
scope of *[his][her]* employment at the time of the
occurrence.

NOTE ON USE

Use A when ownership of the vehicle and status of the employee are admitted; use B when they are in dispute.

COMMENT

When an employee is driving a vehicle owned by the employer, and an accident occurs, there is a presumption of fact that the employee is acting within the scope of his employment. The party against whom the presumption is directed has the burden of overcoming this presumption. *Id.* See Ark. R. Evid. 301. In *Nipper*, the Supreme Court reviewed earlier cases which described this presumption by various terms and clarified that the proper description is a presumption of fact.

Facts other than those set out in AMI 703 should not be included in the instruction. *Steel Erectors, Inc. v. Lee*, 253 Ark. 151, 484 S.W.2d 874 (1972). It is error to give this instruction when the vehicle is owned by the employee even though the vehicle bears the employer's business sign. *Orkin Exterminating Co. v. Wheeling Pipeline, Inc.*, 263 Ark. 711, 567 S.W.2d 117 (1978).

Research References

West's Key Number Digest
Automobiles Ⓒ246(15)

Legal Encyclopedias
C.J.S., Motor Vehicles §§ 1450, 1468, 1494

AMI 704

AGENCY—EMPLOYMENT—DEVIATION FROM
ROUTE

If an *[agent]* *[employee]* abandons the business of *[his]**[her]* *[principal]* *[employer]* to perform an act or engage in an activity for *[his]**[her]* own exclusive purpose and not in furtherance of *[his]**[her]* *[principal's]* *[employer's]* interests, that act or activity is not in the scope of the *[agent's authority]* *[employment]*.

NOTE ON USE

This instruction should be given with AMI 702 when deviation by the agent is an issue.

COMMENT

This instruction is a correct statement of the law. *Nipper v. Brandon Co.*, 262 Ark. 17, 553 S.W.2d 27 (1977).

In *Davis v. Kukar*, 235 Ark. 139, 357 S.W.2d 275 (1962), the employee's deviation was so obvious that, as a matter of law, he was acting outside the scope of his employment. In *Healey v. Cockrill*, 133 Ark. 327, 202 S.W. 229 (1918), the employee was not mingling his own business with that of his employer, but he had completely departed from the employer's business.

Research References

West's Key Number Digest
Automobiles ⌚246(15); Labor and Employment ⌚3106(3); Principal and Agent ⌚194(2)

Legal Encyclopedias
C.J.S., Agency § 604; Motor Vehicles §§ 1450, 1468, 1494

AMI 705

AGENCY—OWNER A PASSENGER IN VEHICLE

[The vehicle] [One of the vehicles] involved in this case was driven by _____ and was owned by _____

(driver)

_____, who was a passenger in it at the time of _____
(passenger-owner)

the occurrence. You may consider this fact [along with any other evidence in the case] in deciding whether _____, the driver, was acting as agent for _____

(driver)

_____, the passenger.
(passenger-owner)

NOTE ON USE

Use this instruction when a party seeks to impute the negligence of a driver to a passenger in the driver's vehicle who also owns the vehicle.

COMMENT

A spousal relationship is insufficient in and of itself to establish agency or a joint enterprise. The court in *Rogers v. Crawford*, 220 Ark. 385, 396, 247 S.W.2d 1005, 1011 (1952), held that "... some affirmative conduct must be shown other than the naked fact that husband and wife are driving in the same car." See also *Ingersoll v. Mason*, 254 F.2d 899, 903 (8th Cir. 1958) ("no agency relationship or joint enterprise exists between married persons in the operation of an automobile, driven by one and ridden in by the other *unless the passenger has a right to control the car from his ownership of it*, or the owner-driver agrees to or acquiesces in the passenger's assumption of its control and direction").

On the other hand, the court in *Johnson v. Newman*, 168 Ark. 836, 271 S.W. 705 (1925), held that the owner's presence in the car, even in the absence of any family relationship, does create a jury issue as to agency.

The decision in *McMahan v. Berry*, 319 Ark. 88, 890 S.W.2d 242 (1994), emphasizes that this instruction is appropriate only when the owner is present in the vehicle.

Although an inference of agency may be drawn from the owner's presence in the vehicle, it would be an improper comment on the evidence for the court to inform the jury that such an inference may be drawn. *Thiel v. Dove*, 229 Ark. 601, 317 S.W.2d 121 (1958).

Research References

West's Key Number Digest
Automobiles ⚡246(15)

Legal Encyclopedias
C.J.S., Motor Vehicles §§ 1450, 1468, 1494

AMI 706

AGENCY—MINOR DRIVER'S PARENT A PASSENGER

[The vehicle] [One of the vehicles] involved in this case was driven by _____, the minor child of _____, who was a passenger in the vehicle [and _____, who was a passenger in the vehicle [and owned the vehicle]. You may consider *[this fact] [these facts] [along with any other evidence in the case]* in deciding whether _____ the minor driver, was acting as agent for _____, *[his][her]* parent at the time of the occurrence.

NOTE ON USE

Use appropriate bracketed material when the parent in the automobile is also the owner of the car. In many of these situations, agency will not be an issue, because the parent will have signed or was obligated to sign the application for the minor's operator license. Use AMI 802, 803, or 804 to fit the particular fact situation.

COMMENT

In *Callaway v. Cherry*, 229 Ark. 297, 314 S.W.2d 506 (1958), the Supreme Court held that a parent's presence in a vehicle driven by a minor child made a jury question of agency even though the parent passenger did not own the car. Of course, if the parent-occupant is also the owner, a stronger argument is made for agency. Although the *Callaway* case holds that an inference of agency may be drawn from the parent's presence in the vehicle, it would be an improper comment on the evidence for the court to inform the jury that such an inference may be drawn. *Thiel v. Dove*, 229 Ark. 601, 317 S.W.2d 121 (1958).

The decision in *McMahan v. Berry*, 319 Ark. 88, 890 S.W.2d 242 (1994), emphasizes that this instruction is appropriate only when the parent is present in the vehicle.

Research References

West's Key Number Digest
Automobiles ⇨246(15)

Legal Encyclopedias
C.J.S., Motor Vehicles §§ 1450, 1468, 1494

AMI 707

AGENT OR INDEPENDENT CONTRACTOR

One of the questions for you to decide is whether at the time of the occurrence _____ was the agent of _____, or was an independent contractor. (alleged agent)
(employer)

An agent is a person who, by agreement with another called the principal, acts for the principal and is subject to [his][her][its] control. The agreement may be oral or written or implied from the conduct of the parties and may be with or without compensation.

If one person has the right to control the actions of another at a given time, the relationship of principal and agent may exist at that time, even though the right to control may not actually have been exercised.

An independent contractor is one who, in the course of [his][her] independent occupation, is responsible for the performance of certain work, uses [his][her] own methods to accomplish it, and is subject to the control of the employer only as to the result of [his][her] work.

[Any (negligence) (fault) of an agent while acting in the scope of [his][her] authority is charged to [his][her] principal. On the other hand, any (negligence) (fault) of an independent contractor is not charged to [his][her] employer.]

NOTE ON USE

This instruction may be given only when there is an issue whether a person is an agent or an independent contractor.

This instruction should not be given when the party is prohibited

as a matter of law from denying responsibility for the acts of the person engaged by him, whether the person hired be an agent or an independent contractor. For example, see AMI 708 and 709.

Use AMI 209 with this instruction only if it is undisputed that the alleged agent was performing a service for and was being compensated by the principal. Otherwise, use AMI 207.

This instruction should not be used when ultrahazardous activities are involved.

Do not use last paragraph when the issue of agent or independent contractor is submitted on interrogatories.

COMMENT

This instruction is a correct statement of the law. *Johnson Timber Corp. v. Sturdivant*, 295 Ark. 622, 752 S.W.2d 241 (1988).

In distinguishing between agents and independent contractors, the Arkansas Supreme Court has relied on the Restatement (Second) of Agency § 220, which articulates ten factors to guide this inquiry. It has held that the first factor—the principal's right to control the putative agent's behavior—carries the most weight. *See Blankenship v. Overholt*, 301 Ark. 476, 479, 786 S.W.2d 814, 815 (1990); *see also Howard v. Dallas Morning News, Inc.*, 324 Ark. 91, 100, 918 S.W.2d 178, 183 (1996); *Dickens v. Farm Bureau Mut. Ins. Co. of Ark.*, 315 Ark. 514, 517, 868 S.W.2d 476, 478 (1994).

A physician may be found to be an agent or employee of a for-profit clinic or hospital where he practices. *Medi-Stat, Inc. v. Kusturin*, 303 Ark. 45, 792 S.W.2d 869 (1990).

A contract between the owner of a construction project and an independent contractor may present a question of fact with respect to the duty to supervise. *Elkins v. Arkla, Inc.*, 312 Ark. 280, 849 S.W.2d 489 (1993).

An agreement may be implied from conduct or oral statements of the parties, even though a writing provides otherwise. *Howard v. Dallas Morning News, Inc.*, 324 Ark. 91, 918 S.W.2d 178 (1996).

State law, not federal law, including the Federal Motor Carrier Safety Administration regulations, controls the question of whether drivers of leased trucks are employees of motor carriers-lessees or independent contractors. *Kistner v. Cupples*, 2010 Ark. 416, at 2, citing 49 C.F.R. § 376.12(c)(4).

Research References

West's Key Number Digest

Labor and Employment ⇨3181(7); Principal and Agent ⇨194(1)

Legal Encyclopedias
C.J.S., Agency §§ 602, 604

AMI 707A

BORROWED SERVANT

One of the questions for you to decide is whether at the time of the occurrence _____ was the employee of _____ or _____.

(servant)

(general employer) (third party employer)

One employer may loan an employee to another employer to perform a particular service. The employer who directs and controls the employee's performance of the service at the time of the occurrence is deemed to be the employer responsible for the employee's conduct.

NOTE ON USE

This instruction may be given only when there is an issue whether the employee was a borrowed servant.

A burden of proof instruction must be used in conjunction with this instruction. AMI 207 should be adapted where the plaintiff must prove that the employee was employed by the defendant at the time of the occurrence. AMI 209 should be adapted where the defendant admits employing the employee, but contends that the employee had been loaned to a third party. Thus:

(defendant) contends it loaned (employee) to (alleged third party employer) who is responsible for the conduct of the employee at the time of the occurrence. (defendant) has the burden of proving (employee) was employed by (third party employer) at the time of the occurrence.

AMI 208 may be adapted where it is undisputed that the defendant is responsible for the employee's actions at the time of the occurrence.

COMMENT

This instruction is based on the one given in *Donahue v Cowdrey*, 246 Ark. 1028, 1031, 440 S.W.2d 773, 774-75 (1969) and *George's Inc. v. Otwell*, 282 Ark. 152, 153, 666 S.W.2d 406, 407 (1984). In *Otwell*, the court stated that "the most significant question regarding a loaned employee is which company has direction and control." 282 Ark. at 154, 666 S.W.2d at 407. See also *McMullen v. Healthcare Staffing Associates, Inc.*, 2012 Ark. App. 617, at 6.

It is ordinarily a fact question as to whether the general or special employer had the right to control and thus was the employee's master; however, it becomes a matter of law where all of the evidence points in one direction and there is no rational basis for reasonable minds to differ. *St. Joseph's Regional Health Center v. Munos*, 326 Ark. 605, 613, 934 S.W.2d. 192, 196 (1996).

AMI 708

**INHERENTLY DANGEROUS WORK—IMPUTED
CONDUCT—INDEPENDENT CONTRACTOR**

When I use the expression “inherently dangerous,” I mean *[work to be performed]* *[or]* *[an instrumentality to be used]* that can be safely *[carried on]* *[or]* *[used]* only by the exercise of special skill and care and which involves a grave risk of serious harm when it is unskillfully or carelessly *[done]* *[or]* *[used]*.

[Ordinarily an employer is not chargeable with the negligence (*fault*) of an independent contractor; however, when the (*work to be performed*) (*or*) (*instrumentality to be used*) is inherently dangerous, any negligent conduct of an independent contractor is chargeable to his/her employer.]

NOTE ON USE

Do not use the second paragraph of this instruction when the case is submitted on interrogatories.

The second paragraph of this instruction is not applicable when the injured party is an employee of the independent contractor. *Jackson v. Petit Jean Elec. Coop.*, 270 Ark. 506, 606 S.W.2d 66 (1980).

COMMENT

This instruction is a correct statement of the law. *McCorkle Farms, Inc. v. Thompson*, 79 Ark. App. 150, 84 S.W.3d 884 (2002).

The following activities have been found to be inherently dangerous: *Copeland v. Hollingsworth*, 259 Ark. 603, 535 S.W.2d 815 (1976) (spraying of 2-4-5-T herbicide); *Hammond Ranch Corp. v. Dodson*, 199 Ark. 846, 136 S.W.2d 484 (1940) (aerial application of arsenic poison); and *McCorkle Farms, Inc.*, *supra* (aerial application of 2-4-D). The mere flying of a crop dusting airplane, however, has been found not to be inherently dangerous. *Little v. McGraw*, 250 Ark. 766, 467 S.W.2d 163 (1971) (plaintiff's decedent killed when struck by a low flying cropduster).

Research References

West's Key Number Digest
Labor and Employment Ⓒ3181(7)

AMI 709

**LIABILITY OF EMPLOYER FOR EMPLOYMENT OF
INCOMPETENT INDEPENDENT CONTRACTOR**

 claims that **negligently hired**
(Plaintiff) (defendant)
 and has the burden of proving each of
(independent contractor)
the following five essential propositions:

First, that **sustained damages;**
(plaintiff)

Second, that **knew or should have known**
(defendant)
that **was incompetent to perform the**
(independent contractor)
work **hired** **to do;**
(defendant) (independent contractor)

Third, that **[negligently][recklessly-**
(independent contractor)
][incompetently] performed such work;

Fourth, that **was negligent in hiring**
(defendant)
 ; and
(independent contractor)

Fifth, that **negligence was the proximate**
(defendant's)
cause of **damages.**
(plaintiff's)

[If you find from the evidence that each of these propositions has been proved, then your verdict should be for plaintiff; but if, on the other hand, you find that any of these propositions has not been proved, then your verdict should be for defendant.]

NOTE ON USE

Do not use the bracketed last paragraph if the case is submitted on interrogatories.

COMMENT

This instruction is based on *Ozan Lumber Co. v. McNeely*, 214 Ark. 657, 217 S.W.2d 341 (1949); *Arkansas Pools, Inc. v. Beavers*, 281 Ark. 109, 661 S.W.2d 395 (1983), and *Stoltze v. Arkansas Valley Electric Cooperative Corp.*, 354 Ark. 601, 127 S.W.3d 466 (2003).

As a general rule, an employer is not responsible for the negligence of his or her independent contractor; but "an employer may be held liable for the conduct of a careless, reckless, or incompetent contractor when the employer was negligent in hiring the contractor." *Stoltze*, 354 Ark. at 607, 127 S.W.3d at 470. The party alleging negligence must prove that the employer either knew or should have known of the independent contractor's incompetence to perform the work for which the contractor was hired. *Newton v. Clark*, 266 Ark. 237, 241, 582 S.W.2d 955, 957 (1979). See also *Little v. McGraw*, 250 Ark. 766, 467 S.W.2d 163 (1971) (finding evidence sufficient to support a claim of negligent hiring of a cropduster whom defendant "didn't think" had a proper license and whose incompetence injured plaintiff).

"It is not enough, however, to prove that the work of the independent contractor was negligently performed since no presumption arises as to the negligence of the employer as a result of the negligence of the independent contractor." *Arkansas Pools, Inc.*, 281 Ark. at 111, 661 S.W.2d at 396. Further, "an employer who has had previous successful experience with an independent contractor cannot be held liable on the theory of negligent supervision." *Id.* (citing *W. Ark. Telephone Co. v. Cotton*, 259 Ark. 216, 219, 532 S.W.2d 424, 426 (1976)).

Research References

West's Key Number Digest
Labor and Employment ◉3181(7)

AMI 709A

**ISSUES—LIABILITY OF EMPLOYER FOR
NEGLIGENT HIRING, SUPERVISION, OR
RETENTION OF EMPLOYEE**

 claims that negligently [hired]
(Plaintiff) (defendant)
[supervised] [and] [retained] and has the
(employee)
burden of proving each of the following four essential
propositions:

First, that sustained damages;
(plaintiff)

Second, that knew, or in the exercise of
(defendant)
reasonable care should have known, that
(employee)
subjected others to an unreasonable risk of harm;

Third, that was negligent in [hiring]
(defendant)
[supervising] [and] [retaining] ; and
(employee)

Fourth, that negligence in [hiring] [super-
(defendant's)
vising] [and] [retaining] was a proximate cause
(employee)
of damages.
(plaintiffs)

[If you find from the evidence that each of these
propositions has been proved, then your verdict
should be for ; but if, on the other hand, you
(plaintiff)
find that any of these propositions has not been
proved, then your verdict should be for .]
(defendant)

NOTE ON USE

Do not use the bracketed last paragraph if the case is submitted on interrogatories.]

COMMENT

This instruction is based on *Saine v. Comcast Cablevision of Arkansas, Inc.*, 354 Ark. 492, 497, 502, 126 S.W.3d 339, 342, 345 (2003) (describing elements of negligent hiring, supervision, and retention claims) and *Regions Bank & Trust v. Stone County Skilled Nursing Facility, Inc.*, 345 Ark. 555, 567–569, 49 S.W.3d 107, 115–16 (2001) (discussing negligent supervision claim). *See also* *Porter v. Harshfield*, 329 Ark. 130, 948 S.W.2d 83 (1997) (discussing negligent hiring claim); *St. Paul Fire & Marine Ins. v. Knight*, 297 Ark. 555, 764 S.W.2d 601 (1989) (discussing negligent hiring claim).

Negligent hiring cases typically involve an alleged failure to perform an adequate background check. *See Saine*, 354 Ark. at 502, 126 S.W.3d at 345 (describing the showing a negligent hiring plaintiff must make). The court in *Saine* further stated that the plaintiff also must prove “a direct causal connection between an inadequate background check and the criminal act for which the appellant is attempting to hold the employer liable.” *Id.*

Negligent supervision and retention cases hinge on the element of foreseeability of the employee’s actions. Employers have a “limited duty to control an employee for the protection of third parties even where the employee is acting outside the scope of employment,” but the employer is not liable for such conduct unless “the employer knew, or in the exercise of reasonable care[] should have known[,] that the employee presented a risk of danger to others.” *Regions Bank & Trust*, 345 Ark. at 568, 49 S.W.3d at 113. *See also Saine*, 354 Ark. at 497, 126 S.W.3d at 342 (stating that under theories of negligent supervision and retention, employer liability rests on proof that employer knew or should have known that employee’s conduct would subject third parties to unreasonable risk of harm).

Claims for negligent supervision have been upheld in cases in which an employer was put on notice of the risk of harm because the employer knew of the employee’s prior misconduct, *Saine*, 354 Ark. at 500, 126 S.W.3d at 344 (employee had made inappropriate comments of a sexual nature regarding a female customer and had unlocked her windows), *Sparks Regional Medical Center v. Smith*, 63 Ark. App. 131, 133–134, 976 S.W.2d 396, 398 (1998) (prior act of sexual contact and conversation with female patients), or because the employer had hired “two ex-convicts, one of whom had been drinking,” to forcibly eject patrons, *American Automobile Auction, Inc. v. Titsworth*, 292 Ark. 452, 455, 730 S.W.2d 499, 501 (1987) (“foreseeable consequence of using inebriated

ex-convict bouncers is that they might use too much force in carrying out their duties in ejecting patrons from a bar"). Such claims have been rejected when plaintiff failed to produce evidence of prior misconduct by the employee. *Regions Bank & Trust*, 345 Ark. at 569, 49 S.W.3d at 116 (criminal sexual abuse of patient by newly-certified nursing assistant was not foreseeable where employee had no prior criminal record or history of patient abuse); *Porter*, 329 Ark. at 138-139, 948 S.W.2d at 86-87; *St. Paul Fire & Marine Ins.*, 297 Ark. at 562, 764 S.W.2d at 605.

In *Regions Bank & Trust*, which involved sexual abuse of a nursing home patient by a nursing home employee, the court explained the distinction between a claim for negligent supervision, which is based on the relationship between the employer and the employee, and negligent patient care, which is based on the relationship between the care provider and the patient. 345 Ark. at 563-64, 49 S.W.3d at 112-13 (quoting *Niece v. Elmview Grp. Home*, 131 Wash. 2d 39, 929 P.2d 420 (1997)). Proof of a claim for negligent patient care, because it imposes a duty to protect patients from all foreseeable harms, subsumes a claim for negligent supervision. *Regions Bank & Trust*, 345 Ark. at 564, 49 S.W.3d at 113.

A claim for negligent supervision "provides a remedy to third parties who otherwise would not be able to recover under respondeat superior because of the scope of employment requirements." *Sparks Reg'l Med. Ctr.*, 63 Ark. App. at 135, 976 S.W.2d at 399. But if a defendant employer or principal admits vicarious liability for the negligence of the employee or agent, the plaintiff may not pursue a claim for negligent entrustment, hiring, or retention against such defendant. *Elrod v. G&R Constr. Co.* 275 Ark. 151, 154, 628 S.W.2d 17, 19 (1982) (defendant employer admitted liability under respondeat superior for employee's wrongful conduct); *Kyser v. Porter*, 261 Ark. 351, 358, 548 S.W.2d 128, 132 (1977) (defendant parents admitted liability under parental liability statute for negligence of minor).

Because they do not rest on the provision of professional services, claims against attorneys for negligent hiring and supervision are not covered by the Arkansas privity statutes, Ark. Stat. Ann. §§ 16-22-310, 16-114-303. *Madden v. Aldrich*, 346 Ark. 405, 413-14, 58 S.W.3d 342, 349 (2001) (claim for negligent supervision of defrauding employee attorney upheld against employer attorney who was aware of employee's previous misconduct). See also *Born v. Hosto & Buchan, PLLC*, 2010 Ark. 292, at 11-12 (noting exemption but ruling that conclusory complaint was insufficient to make out a claim for negligent hiring); *Nielsen v. Berger-Nielsen*, 347 Ark. 996, 1005-07, 69 S.W.3d 414, 419-20 (2002) (ruling that claim against wife's attorney for "breach of implied promise" in connection with divorce action was covered by privity statutes rather than *Madden*).

For a discussion of the torts of negligent hiring of independent contractors and employees, and negligent supervision and retention of

employees, in an opinion declining to recognize a tort for “negligent credentialing,” see *Paulino v. QHG of Springdale, Inc.*, 2012 Ark. 55, at 12-13.

See generally RESTATEMENT (SECOND) OF AGENCY § 213 (1958); RESTATEMENT (THIRD) OF AGENCY § 7.05 (2006); RESTATEMENT (SECOND) OF TORTS, § 317 (1965).

AMI 710

PARTNERSHIP—DEFINITION

A partnership is an association of two or more persons to carry on, as co-owners, a business for profit.

NOTE ON USE

If the jury must determine whether certain alleged misconduct is to be imputed to a party because of the possible existence of a partnership relationship, AMI 207 should be given. On the other hand, if the relationship permitting the imputation of conduct is admitted, use AMI 208.

COMMENT

This instruction is a statement of the definition of "partnership" in Ark. Code Ann. § 4-46-101(6).

Research References

West's Key Number Digest
Partnership ✎779

AMI 711

PARTNERSHIP—TESTS OF EXISTENCE OF
RELATIONSHIP

COMMENT

Appropriate portions of Ark. Code Ann. § 4-46-202 may be read to the jury. It would be proper to tell the jury that they may consider, along with all evidence of applicable factors cited in § 4-46-202 and all other evidence, the fact that profits were shared in determining whether a partnership existed. *See, e.g.,* Thiel v. Dove, 229 Ark. 601, 317 S.W.2d 121 (1958) (court may instruct jury that a certain fact may be considered, in conjunction with the other evidence, but may not comment on the weight of the evidence by declaring that a certain inference may be drawn from a specific fact).

Jury was permitted to consider, in determining whether a partnership existed, the alleged "admission by silence" to the partnership of one alleged partner. *Medlock v. Burden*, 321 Ark. 269, 900 S.W.2d 552 (1995).

Research References

West's Key Number Digest

Partnership Ⓒ779

AMI 712

JOINT ENTERPRISE—DEFINITION AND EFFECT

A joint enterprise is a relationship that may exist between the driver and the other occupant[s] of a [motor vehicle] [aircraft] [boat]. In order for this relationship to exist these two elements must be present: First, [both] [all of the] participants in the joint enterprise must have a community of interest in the object and purpose of the undertaking for which the [vehicle] [aircraft] [boat] is being used. Second, each of them must have an equal right to share in the control of the operation of the [vehicle] [aircraft] [boat]. As to the second element, the question is whether each had a right to share in the control, not whether such a right was actually exercised. If either of these two necessary elements is absent, there is no joint enterprise.

[If you find that a joint enterprise existed in this case, then, as between the participants in the joint enterprise and third persons, any (*negligence*) (*fault*) on the part of (*either*) (*each*) participant in the joint enterprise is chargeable to (*the*) (*every*) other participant.]

NOTE ON USE

If the jury must determine whether certain alleged misconduct is to be imputed to a party because of the possible existence of a joint enterprise, AMI 207 may be used with this instruction. If the relationship permitting the imputation of conduct is admitted, use AMI 208.

Do not use the second paragraph when the case is submitted on interrogatories.

COMMENT

This instruction is based in substantial part on the rule announced in *Lockhart v. Ross*, 191 Ark. 743, 87 S.W.2d 73 (1935), and cited with approval in *Stockton v. Baker*, 213 Ark. 918, 213 S.W.2d 896 (1948).

The Arkansas Supreme Court has announced its willingness and intention to re-examine the viability of the joint enterprise doctrine, including whether it should be available against another member of the enterprise. *Yant v. Woods*, 353 Ark. 786, 120 S.W.3d 574 (2003).

Testimony that the driver would have turned driving over to the co-owner passenger if he had asked warranted giving a joint enterprise instruction. *Neal v. J.B. Hunt Transport, Inc.*, 305 Ark. 97, 805 S.W.2d 643 (1991). It is error to give this instruction where the evidence does not establish equal control between a driver and passenger. *Helton v. Missouri Pac. R. Co.*, 260 Ark. 342, 538 S.W.2d 569 (1976). A sufficient showing of community of interest and equal right to share in the control and operation of the vehicle warranted submission to the jury of an owner-passenger's vicarious liability on a theory of either joint enterprise or agency (AMI 705), or both. *Reed v. McGibboney*, 243 Ark. 789, 422 S.W.2d 115 (1967).

For a general discussion of joint enterprise, see *Lovell v. Brock*, 330 Ark. 206, 952 S.W.2d 161 (1997) (proper query is whether there is enough evidence to show "an equal right to direct and govern the movements and conduct of each other in respect to the common object and purpose of the undertaking").

Research References

West's Key Number Digest
Joint Ventures ◊84

Legal Encyclopedias
C.J.S., Joint Ventures §§ 56, 62 to 67

AMI 713

ISSUES—ACTING IN CONCERT

 [also] claims damages from on the
(Plaintiff) (defendant)
basis that acted in concert with ,
(defendant) (other tortfeasor)
and has the burden of proving each of three essential
propositions:

First, that has proved all the essential
(plaintiff)
propositions necessary for a verdict on the claim for
 ;
(state the underlying intentional tort)

Second, that and entered into a
(defendant) (other tortfeasor)
conscious agreement to pursue a common plan or
design to commit ;
(state the underlying intentional tort)

Third, that actively took part in the
(defendant) (state the

underlying intentional tort)

[If you find from the evidence in this case that
each of these propositions has been proved, then
your verdict on this claim should be for ; but if,
(plaintiff)
on the other hand, you find from the evidence that
any of these propositions has not been proved, then
your verdict on this claim should be for .]
(defendant)

NOTE ON USE

This instruction should be used in cases governed by the Civil
Justice Reform Act of 2003, Ark. Code Ann. § 16-55-205. In cases not
governed by the Civil Justice Reform Act of 2003, use AMI 714.

Do not use the final bracketed paragraph when the case is submitted on interrogatories.

Identify each person or entity claimed to have liability in the first paragraph; identify each of the tortfeasors in the second proposition.

Insert the underlying intentional tort (e.g., fraud, breach of fiduciary duty, interference with contract, etc.) in the first, second and third essential elements. This instruction must be accompanied by a separate instruction which states the essential elements of the underlying tort. For example, if the underlying tort is deceit, use AMI 402 with this instruction.

COMMENT

This instruction incorporates the standards for shared liability prescribed by the Civil Justice Reform Act of 2003, Ark. Code Ann. § 16-55-205. These standards may not be the same as recognized in the doctrine of the civil conspiracy. *See, e.g.,* Dodson v. Allstate Ins. Co., 345 Ark. 430, 47 S.W.3d 866 (2001), *appeal after remand*, 365 Ark. 458, 231 S.W.3d 711 (2006), *subsequent appeal after remand* 2011 Ark. 19 (a corporate agent cannot be held liable for civil conspiracy in the absence of evidence showing that he was acting for his own personal benefit rather than for the benefit of the corporation); Mason v. Funderburk, 247 Ark. 521, 446 S.W.2d 543 (1969) (a civil conspiracy is a combination of two or more persons to accomplish a purpose that is unlawful or oppressive or immoral, by unlawful, oppressive or immoral means, to the detriment of another); Wilson v. Davis, 138 Ark. 111, 211 S.W. 152 (1919) (a conspiracy may be inferred, although no actual meeting of the parties is proved, if the testimony shows that two or more people pursued by their acts the same unlawful object, each doing a part, so that their apparently independent acts were in fact connected).

Research References

West's Key Number Digest
Conspiracy ⇨21

Legal Encyclopedias
C.J.S., Conspiracy §§ 25, 40 to 44

AMI 714

ISSUES—CIVIL CONSPIRACY

 claims damages from for
 (Plaintiff) (defendant)
 conspiracy. A "conspiracy" is an agreement to accomplish a purpose that is unlawful, oppressive or immoral or to accomplish, by unlawful, oppressive, or immoral means, a purpose that is not in itself unlawful, oppressive, or immoral.

In order to recover damages from for conspiracy,
 (defendant)
 has the burden of proving each of four
 (plaintiff)
 essential propositions:

First, that and knowingly
 (defendant) (co-conspirator(s))
 entered into a conspiracy.

Second, that has proved all of the essential
 (plaintiff)
 elements necessary to obtain a verdict against
 (party/
 on the underlying-
 person against whom the underlying intentional tort is asserted)
 ing claim of ;
 (state the underlying intentional tort)

Third, that one or more of the co-conspirators committed one or more overt acts in furtherance of the alleged conspiracy;

And fourth, that the conspiracy proximately caused damages to .
 (plaintiff)

[If you find from the evidence in this case that each of these propositions has been proved, then your verdict should be for ; but if, on the other
 (plaintiff)

hand, you find from the evidence that any of these propositions has not been proved, then your verdict should be for _____.]
(defendant)

NOTE ON USE

This instruction should be used only in cases that are not governed by the Civil Justice Reform Act of 2003, Ark. Code Ann. § 16-55-205. In cases governed by the Civil Justice Reform Act of 2003, use AMI 713.

Insert the underlying intentional tort (e.g., fraud, breach of fiduciary duty, interference with contract, etc.) in the second essential element. This instruction must be accompanied by a separate instruction which states the essential elements of the underlying tort. For example, if the underlying tort is deceit, use AMI 402 with this instruction.

Do not use the final bracketed paragraph when the case is submitted on interrogatories.

COMMENT

This instruction is based upon the elements of civil conspiracy stated in *Wilson v. Davis*, 138 Ark. 111, 211 S.W. 152 (1919); *Mason v. Funderburk*, 247 Ark. 521, 446 S.W.2d 543 (1969); and *Dodson v. Allstate Insurance Co.*, 345 Ark. 430, 47 S.W.3d 866 (2001), *appeal after remand*, 365 Ark. 458, 231 S.W.3d 711 (2006), *subsequent appeal after remand*, 2011 Ark. 19.

While it is clear that civil conspiracy is a derivative tort that is not actionable in and of itself, the Committee believes there are at least four questions left unanswered by Arkansas case law. First, the Texas Supreme Court has held in at least one case that a claim for civil conspiracy cannot be asserted unless the plaintiff is also seeking judgment against another party in the suit for the underlying tort. *Tilton v. Marshall*, 925 S.W.2d 672 (Tex. 1996). A federal district court in Pennsylvania has reached the same conclusion. *Wolk v. Teledyne Indus., Inc.*, 475 F.Supp.2d 491 (E.D.Pa. 2007). The Committee has not found any reported Arkansas case that addresses that issue expressly. However, the instruction, as drafted, is not intended to preclude such a legal argument to the trial court.

Second, related to the foregoing issue is the question whether, in a case where the alleged tortfeasor is also a defendant, the jury must return a verdict on the underlying tort before an alleged conspirator can be found liable for the derivative tort of civil conspiracy. Again, the Committee has not discovered a reported Arkansas case expressly on

point. The Committee notes, however, that the Eighth Circuit Court of Appeals affirmed the dismissal of a claim for conspiracy in *Lane v. Chowning*, 610 F.2d 1385, 1391 (8th Cir. 1979), with the following statement:

We have already determined that Lane has failed to establish either a factual or a legal basis for recovery on any of his several allegations. It follows, then, that no overt act has been established which is a necessary element in establishing the existence of a civil conspiracy.

Therefore, the Committee believes that, at a minimum, the elements of the underlying tort must be established before there can be liability for conspiracy, but it remains unclear whether an actual verdict on the underlying claim is required. If the trial court believes that is a legal requirement, the second element of this instruction should be modified. As with the first question noted in the preceding paragraph, the Committee does not intend to preclude that argument by its statement of the second element in the instruction, but, without more specific authority, has drafted the instruction to require only that there be proof of the elements of the underlying tort.

Third, it is not clear from Arkansas case law whether the conspiracy must proximately cause the damages to the plaintiff for which a conspirator is liable or whether the damages must be proximately caused by the commission of the underlying tort. While this distinction may not make a difference in most cases, there could be a substantial issue related to causation of damages. The Committee has drafted the element of causation to comport with the following language in *Wilson v. Davis*, *supra*: "If such an unlawful agreement exists, the parties thereto become liable as joint tortfeasors and to the extent of the damage done as a result of the conspiracy" 211 S.W. at 154.

Fourth, even though a person may not be liable as a direct actor in interfering with a contract, he may be liable as a participant in a conspiracy which results in one or more overt acts constituting actionable interference. *Lane v. Chowning*, 610 F.2d at 1390. However, while there is no Arkansas case determining whether a person whose acts are privileged and therefore cannot constitute interference with contract can nevertheless be liable for conspiracy to interfere with the contract, cases in other states have so held when there was no issue regarding the application of the privilege. *See, e.g.*, *Watson's Carpet & Floor Covering, Inc. v. McCormick*, 2007 Tenn. App. LEXIS 27 (January 18, 2007) (competitor's privilege precluded interference claim and conspiracy claim); *Gott v. First Midwest Bank of Dexter*, 963 S.W.2d 432 (Mo. App. 1998) (justification of bank and board member to protect economic interest also precluded conspiracy claim); *Scanlon v. Gordon F. Stofer & Bro. Co.*, 1989 Ohio App. LEXIS 2528 (1989) (corporate officer entitled to privilege and therefore no conspiracy liability where there was no evidence he acted beyond the scope of his authority); *Langer v. Becker*, 176

Ill. App. 3d 745, 531 N.E.2d 830 (Ill. App. 1988) (plaintiff did not sufficiently plead malice to overcome qualified privilege and, therefore, claims for interference and conspiracy dismissed).

Since a corporate entity cannot conspire with itself, a civil conspiracy is not legally possible where a corporation and its alleged coconspirators are not separate entities, but, rather, stand in either a principal-agent or employer-employee relationship. *Dodson v. Allstate Ins. Co.*, *supra*. Corporate agents may not be held liable for civil conspiracy in the absence of evidence showing that they were acting for their own personal benefit rather than for the benefit of the corporation. *Id.* If a claim of civil conspiracy is asserted against a corporate agent, this instruction should be modified to add an element related to the agent's acting for his personal benefit.

The Arkansas Supreme Court has held that there can generally be no civil conspiracy between an attorney and his client for actions undertaken in the furtherance of the legal representation. *Born v. Hosto & Buchan, PLLC*, 2010 Ark. 292.

CHAPTER 8

VICARIOUS LIABILITY FOR ACTS OF MINORS

Table of Instructions

AMI

- 801. Willful or Malicious Destruction of Property by Minor.
- 802. Automobiles—Permitting Minor Under 14 to Drive.
- 803. Automobiles—Responsibility of Person Signing Application of Child for Operator's License.
- 804. Automobiles—Permitting Minor Under 18 to Drive—Failure to Sign License Application.

AMI 801

WILLFUL OR MALICIOUS DESTRUCTION OF PROPERTY BY MINOR

 claims damages from for willful or
(Plaintiff) (defendant)
malicious destruction of property by a minor and has
the burden of proving each of five essential
propositions:

First, that [he] [she] [it] has sustained damages to
[his] [her] [its] property;

Second, that maliciously or willfully de-
(minor)
stroyed property belonging to ;
(plaintiff)

Third, that is a parent of ;
(defendant) (minor)

Fourth, that _____ was under the age of 18 at the
(minor)
time of the occurrence; and

Fifth, that _____ was living with (defendant) at the
(minor)
time of the occurrence.

[If you find from the evidence in this case that each of these propositions has been proved, then your verdict should be for _____; but if, on the other
(plaintiff)
hand, you find from the evidence that any of these propositions has not been proved, then your verdict should be for _____.]
(defendant)

NOTE ON USE

The final bracketed sentence should not be used when the case is submitted on interrogatories.

COMMENT

This instruction is based on Ark. Code Ann. § 9-25-102. See AMI 605 for a parent's common law liability.

Strict construction of the statute is required because of its penal nature; thus, the term "willfully" means "an intent to do the act in question." *Farm Bureau Mut. Ins. Co. of Ark., Inc. v. Henley*, 275 Ark. 122, 127, 628 S.W.2d 301, 304 (1982).

Research References

West's Key Number Digest
Parent and Child ☞370

Legal Encyclopedias
C.J.S., Parent and Child §§ 333 to 335

AMI 802

**AUTOMOBILES—PERMITTING MINOR UNDER 14
TO DRIVE**

 claims damages from for permitting
(Plaintiff) (defendant)
a minor under 14 to drive and has the burden of proving each of five essential propositions:

First, that [he] [she] [it] has sustained damages;

Second, that was under the age of 14 at the
(minor)
time of the occurrence;

Third, that was negligent in the operation of
(minor)
the motor vehicle;

Fourth, that the negligence of in the operation
(minor)
of the motor vehicle was a proximate cause of the [injuries] [and] [damages] sustained by ;
(plaintiff)
and

Fifth, that permitted to operate a motor
(defendant) (minor)
vehicle on a street or highway.

[If you find from the evidence in this case that each of these propositions has been proved, then your verdict should be for ; but if, on the other
(plaintiff)
hand, you find from the evidence that any of these propositions has not been proved, then your verdict should be for .]
(defendant)

NOTE ON USE

The final bracketed sentence should not be used when the case is submitted on interrogatories.

COMMENT

This instruction is based on Ark. Code Ann. §§ 27-16-602 and 27-16-604 (unlawful for persons under the age of 14 to drive).

In *Carter v. Montgomery*, the court stated that permitting an under-age person to drive is negligence *per se*, but held that it was not error to refuse to so instruct the jury where there was no evidence of causation. 226 Ark. 989, 991, 995, 296 S.W.2d 442, 443, 445 (1956).

For definition of a street or highway see Ark. Code Ann. § 27-49-212(d).

Research References

West's Key Number Digest
Automobiles ¶246(14)

Legal Encyclopedias
C.J.S., Motor Vehicles §§ 1450, 1455, 1494

AMI 803

**AUTOMOBILES—RESPONSIBILITY OF PERSON
SIGNING APPLICATION OF CHILD FOR
OPERATOR'S LICENSE**

 claims damages from for a minor's
(Plaintiff) (defendant)
[negligence] [willful misconduct] while driving a motor vehicle where signed the minor's application for an operator's permit or license, and
(defendant) (plaintiff)
has the burden of proving each of five essential propositions:

First, that [he] [she] [it] has sustained damages;

Second, that signed the application of
(defendant)
 for an [instruction permit] [learner's license] [intermediate driver's license];
(minor)

Third, that was under the age of 18 at the
(minor)
time of the occurrence;

Fourth, that was [negligent] [engaged in willful misconduct] when driving the motor vehicle on the street or highway; and
(minor)

Fifth, that such [negligence] [willful misconduct] of in the operation of the motor vehicle was a proximate cause of the [injuries] [and] [damages] sustained by .
(minor) (plaintiff)

[If you find from the evidence in this case that each of these propositions has been proved, then your verdict should be for ; but if, on the other
(plaintiff)

hand, you find from the evidence that any of these propositions has not been proved, then your verdict should be for .]

(defendant)

NOTE ON USE

This instruction is applicable when the person sought to be charged with the negligence of a minor vehicle operator actually signed the minor's application for a permit or a license.

The final bracketed sentence should not be used when the case is submitted on interrogatories.

COMMENT

This instruction is based on Ark. Code Ann. § 27-16-702(a), (b). *See* Garrison v. Funderburk, 262 Ark. 711, 716-17, 561 S.W.2d 73, 75-76 (1978) (statute applied to impute minor's negligence to parent in parent's action for damages to the vehicle).

For definition of a street or highway, *see* Ark. Code Ann. § 27-49-212(d).

Research References

West's Key Number Digest
Automobiles ¶246(15)

Legal Encyclopedias
C.J.S., Motor Vehicles §§ 1450, 1468, 1494

AMI 804

**AUTOMOBILES—PERMITTING MINOR UNDER 18
TO DRIVE—FAILURE TO SIGN LICENSE
APPLICATION**

 claims damages from for a minor's
(Plaintiff) (defendant)
[negligence] [willful misconduct] while driving a motor vehicle by causing, knowingly causing, or permitting the minor to drive a motor vehicle upon any street or highway and has the burden of proving each of five essential propositions:

First, that [he] [she] [it] has sustained damages;

Second, that was under the age of 18 at the
(minor)
time of the occurrence;

Third, that [caused] [knowingly caused] or
(defendant)
[permitted] to drive a motor vehicle upon any
(minor)
street or highway;

Fourth, that was [negligent] [engaged in will-
(minor)
ful misconduct] when driving the motor vehicle on the street or highway; and

Fifth, that such [negligence] [willful misconduct] of in the operation of the motor vehicle was a
(minor)
proximate cause of the [injuries] [and] [damages] sustained by .
(plaintiff)

[If you find from the evidence in this case that each of these propositions has been proved, then your verdict should be for ; but if, on the other
(plaintiff)

hand, you find from the evidence that any of these propositions has not been proved, then your verdict should be for _____.]
(defendant)

NOTE ON USE

This instruction assumes that Ark. Code Ann. § 27-16-702(a) and (c) are applicable.

The final bracketed sentence should not be used when the case is submitted on interrogatories.

COMMENT

The governing statute was construed and applied in *Vaught v. Ross*, 244 Ark. 1218, 428 S.W.2d 631 (1968). In *Garrison v. Funderburk*, 262 Ark. 711, 716-17, 561 S.W.2d 73, 75-76 (1978), the statute was applied to impute a minor's negligence to his parent in his parent's action for damages to the vehicle.

If a natural parent is alive, a stepparent is not obligated to sign the minor's license application. *Jones v. Davis*, 300 Ark. 130, 131, 777 S.W.2d 582, 582, *opinion on reh'g*, 779 S.W.2d 181 (1989).

The court, in *Andrews v. Springer*, held that failure to give this instruction was not error where the case was submitted on interrogatories, citing the Note on Use. 268 Ark. 646, 648, 594 S.W.2d 586, 588 (1980).

For definition of a street or highway see Ark. Code Ann. § 27-49-212(d).

Research References

West's Key Number Digest
Automobiles ¶246(14)

Legal Encyclopedias
C.J.S., Motor Vehicles §§ 1450, 1455, 1494

CHAPTER 9

RULES OF THE ROAD

Table of Instructions

AMI

- 901. Common Law Rules of Road—Lookout—Control—Speed.
- 902. Superior Right of Forward Vehicle.
- 903. Violation of Statute or Ordinance as Evidence of Negligence.
- 904. Right of Way—Uncontrolled Intersection.
- 905. Right of Way—Stop Intersection.
- 906. Right of Way—Four-Way Stop Intersection.
- 907. Right of Way—Signal Light Intersection.
- 908. Right of Way—Yield Intersection.
- 909. Right of Way—Definition—Acquisition—Use.
- 910. Operating Unsafe Vehicle.
- 911. Pedestrians and Motorists—Common Right to Use the Streets and Highways.
- 912. Passenger—Duty to Use Ordinary Care.
- 913. Emergency Vehicles—Special Privileges.
- 914. Emergency Vehicles—Duty of Drivers of Other Vehicles.

AMI 901

COMMON LAW RULES OF ROAD—LOOKOUT—CONTROL—SPEED

In determining whether the driver of a motor vehicle was negligent, you may consider the following *[rule] [two] [three] [rules of the road]*:

- A. *[First]* It is the duty of the driver of a motor vehicle to keep a lookout for other vehicles or persons on the street or highway. The lookout required is that which a reasonably

careful driver would keep under circumstances similar to those shown by the evidence in this case.

- B. [Second] It is the duty of the driver of a motor vehicle to keep *[his][her]* vehicle under control. The control required is that which a reasonably careful driver would maintain under circumstances similar to those shown by the evidence in this case.

[(When the driver sees danger) (or) (when danger would be reasonably apparent to the driver who is keeping a proper lookout) (or) (when the driver is warned of approaching imminent danger), then [he][she] is required to use ordinary care to have [his][her] vehicle under such control as to be able to check its speed or stop it, if necessary, to avoid damage to [himself][herself] or others.]

- C. [Third] It is the duty of the driver of a motor vehicle to drive at a speed no greater than is reasonable and prudent under the circumstances, having due regard for any actual or potential hazards.

A failure to meet the standard of conduct required by *[this rule] [either of these two rules] [any of these three rules]* is negligence.

NOTE ON USE

Paragraph A

When a parking lot or other area is involved, substitute appropriate phrase for "on the street or highway."

Paragraph B

The first paragraph will be used in virtually every case. The first

and second paragraphs should be combined only when the evidence involves an imminent danger or threatened emergency. The third clause in parentheses should be inserted only when warning signs or signals are involved or when there is evidence of some other type of warning.

Paragraph C

Although this common law rule is codified in Ark. Code Ann. § 27-51-201(a)(1), it should not be given within the format of AMI 903 because the statute is a codification of the common law duty to use ordinary care.

COMMENT

This instruction is based on the holding in *Wright v. Covey*, 233 Ark. 798, 349 S.W.2d 344 (1961). It was cited with approval in *Smith v. Stevens*, 313 Ark. 534, 855 S.W.2d 323 (1993) and *Courson v. Chandler*, 258 Ark. 904, 529 S.W.2d 864 (1975).

This instruction applies to cases involving the operation of vehicles on parking lots. *Cantlin v. Pavlovich*, 265 Ark. 654, 580 S.W.2d 190 (1979).

Paragraph A

Paragraph A of this instruction was cited with approval in *Druckemiller v. Cluff*, 316 Ark. 517, 873 S.W.2d 526 (1994).

Proper lookout implies being watchful of one's own vehicle, as well as the movement of the things seen, and may require a lookout to the rear. *Wingate Taylor-Maid Transp., Inc. v. Baker*, 310 Ark. 731, 840 S.W.2d 179 (1992); *Cobb v. Atkins*, 239 Ark. 151, 388 S.W.2d 8 (1965).

Paragraph B

Paragraph B of this instruction is based on the holdings in *Missouri Pac. Transp. Co. v. Miller*, 227 Ark. 351, 299 S.W.2d 41 (1957); *Lockhart v. Ross*, 191 Ark. 743, 87 S.W.2d 73 (1935); *Coca Cola Bottling Co. of Blytheville v. Doud*, 189 Ark. 986, 76 S.W.2d 87 (1934) and *Craighead v. Missouri Pac. Transp. Co.*, 195 F.2d 652 (8th Cir. 1952). It was cited with approval in *Druckemiller v. Cluff*, 316 Ark. 517, 873 S.W.2d 526 (1994).

The last sentence in Note on Use—Paragraph B was approved in *White v. Brewer*, 295 Ark. 666, 750 S.W.2d 956 (1988).

The court held it to be improper to refuse the second paragraph of Paragraph B when there is a busy industrial street, along with children who habitually play in that vicinity in *Moore v. Rye*, 255 Ark. 469, 500 S.W.2d 751 (1973). The court has held it to be proper to give the second paragraph of Paragraph B in the following situations: when there is

dense smoke along a highway, *East Texas Motor Freight Lines, Inc. v. Freeman*, 289 Ark. 539, 713 S.W.2d 456 (1986), and when vehicles are blocking a highway, *White v. Brewer*, *supra*.

The court has held it was improper to give the second paragraph of Paragraph B in the following situations: when there is a traffic light at an intersection, *Berry v. Chapple*, 309 Ark. 612, 832 S.W.2d 256 (1992); when a driver sees a pedestrian standing in a position of apparent safety near the center of the street, *Rogers v. Kelly*, 284 Ark. 50, 679 S.W.2d 184 (1984); when a driver is faced with an unexpected emergency, which could not be reasonably anticipated, *Home Ins. Co. v. Harwell*, 263 Ark. 884, 568 S.W.2d 17 (1978), and when a vehicle is waiting to make a lefthand turn, *Reed v. McGibboney*, 243 Ark. 789, 422 S.W.2d 115 (1967).

A driver is not required to exercise such control at all times as would enable him to stop at any given time. See *Coca Cola Bottling Co. of Blytheville v. Doud*, *supra*, and *Craighead v. Missouri Pac. Transp. Co.*, *supra*.

Paragraph C

Violation of a common law rule requiring the exercise of ordinary care is negligence; violation of a statutory rule is only evidence of negligence (AMI 903). The Committee has found no authority for the view that incorporation of a common law rule defining the duty to use ordinary care within a statute modifies or reduces the effect of the common law rule, and logically it would not seem to do so. See *Wright v. Covey*, 233 Ark. 798, 349 S.W.2d 344 (1961). Moreover, *Bona v. S.R. Thomas Auto Co.*, 137 Ark. 217, 208 S.W. 306 (1919), holds that a driver is under a duty to control his speed "aside from any statutory provisions."

When there was no evidence that the driver had been driving unreasonably fast, Paragraph C was properly refused. *Rathbun v. Ward*, 315 Ark. 264, 866 S.W.2d 403 (1993).

Research References

West's Key Number Digest
Automobiles ¶246(19), 246(20)

Legal Encyclopedias
C.J.S., Motor Vehicles §§ 1450, 1471 to 1472, 1494

AMI 902

SUPERIOR RIGHT OF FORWARD VEHICLE

When two vehicles are traveling in the same direction, the vehicle in front has the superior right to the use of the highway [*for the purpose of "leaving it to enter an intersecting road" (or other appropriate language)*], and the driver behind must use ordinary care to operate [his][her] vehicle in recognition of this superior right. This does not relieve the driver of the forward vehicle of the duty to use ordinary care and to obey the rules of the road.

NOTE ON USE

When common-law or statutory rules of the road are given along with AMI 902, it is recommended, for the jury's better understanding of the charge as a whole, that AMI 902 immediately precede the other instructions on the subject.

The purpose for which the lead car has the superior right to the use of the road must be inserted within the brackets.

This instruction may be given along with Ark. Code Ann. §§ 27-51-306, 27-51-403 and 27-51-404, inserted in the format of AMI 903.

COMMENT

The first sentence of this instruction is based on the holdings in *Acco Transp. Co. v. Smith*, 207 Ark. 70, 178 S.W.2d 1011 (1944); *Cohen v. Ramey*, 201 Ark. 713, 147 S.W.2d 338 (1941); *Ward v. Haralson*, 196 Ark. 785, 120 S.W.2d 322 (1938), and *Madison-Smith Cadillac Co. v. Lloyd*, 184 Ark. 542, 43 S.W.2d 729 (1931).

The last sentence in this instruction is based on the holding in *Hagan v. Knowles*, 223 Ark. 590, 267 S.W.2d 514 (1954).

This instruction was cited with approval in *Wasson v. Warren*, 245 Ark. 719, 434 S.W.2d 51 (1968).

Although this instruction does not apply in every situation where one vehicle strikes another from behind, it was properly given in *East Texas Motor Freight Lines, Inc. v. Freeman*, 289 Ark. 539, 713 S.W.2d 456 (1986), where the forward vehicle stopped in dense smoke to avoid other vehicles.

The purpose for which the lead car acquires the superior right to use the road must be inserted within the brackets. *Smith v. Alexander*, 245 Ark. 567, 433 S.W.2d 157 (1968). When there is no specific purpose for a vehicle to obtain a superior right to use the highway, the giving of this instruction is improper. *Harlan v. Curbo*, 250 Ark. 610, 466 S.W.2d 459 (1971).

Research References

West's Key Number, Digest
Automobiles ⌘246(11)

Legal Encyclopedias
C.J.S., Motor Vehicles §§ 1450, 1462, 1467, 1494

AMI 903

**VIOLATION OF STATUTE OR ORDINANCE AS
EVIDENCE OF NEGLIGENCE**

There *[was]* *[were]* in force in the *[State of Arkansas]* *[and]* *[City of _____]* at the time of the occurrence *[a]* *[_____]* *[statute(s)]* *[ordinance(s)]* *[regulation(s)]*, which provided:

(number)

(Quote or summarize applicable section:)

[First:]

[Second:]

[Third:]

[etc.:]

A violation of *[this]* *[one or more of these _____]* *[statute(s)]* *[ordinance(s)]* *[regulation(s)]*, although not necessarily negligence, is evidence of negligence to be considered by you along with all of the other facts and circumstances in the case.

(number)

NOTE ON USE

If more than one statute, ordinance, or regulation is given, insert the total number to be given in the spaces marked "number."

Insert only statutes, ordinances, or regulations applicable under the facts. Any portions of the statute, ordinance, or regulation not applicable to the facts in the case must be deleted.

See AMI 913 and 914 in cases involving emergency vehicles.

Do not insert any statutory rule that embodies the standard of ordinary care. See AMI 901.

This identical instruction also appears as AMI 601.

COMMENT

This instruction is based on the holding in *Bridgforth v. Vandiver*, 225 Ark. 702, 284 S.W.2d 623 (1955). Where supported by the evidence, it must be given. *McMickle v. Griffin*, 369 Ark. 318, 254 S.W.3d 729 (2007); *suppl' opinion on denial of reh'g*, 2007 WL 1448346 (statutory requirements regarding vehicle permit, lighting, and speed).

I.C.C. safety regulation may establish a standard of care and therefore a violation would be evidence of negligence. *Bussell v. Missouri Pac. R. Co.*, 237 Ark. 812, 376 S.W.2d 545 (1964).

Those engaged in work upon the surface of the highway are not required to observe the statutory rules of the road. Ark. Code Ann. § 27-49-110; *McMillin v. Bearden*, 237 Ark. 673, 376 S.W.2d 665 (1964). See also *Byrd v. Galbraith*, 172 Ark. 219, 288 S.W. 717 (1926).

The Arkansas statute restricting admissibility in civil actions of evidence of seat-belt nonuse, Ark. Code Ann. § 27-37-703, was held unconstitutional on separation-of-powers grounds in *Mendoza v. WIS Int'l, Inc.*, 2016 Ark. 157. *Mendoza* decided only the constitutional question, certified by a federal district court, and did not rule on such evidence's admissibility. The court reasoned that the statute was a rule of evidence and hence a rule "of pleading, practice and procedure," which "falls within this court's domain," rather than a matter of substantive law for the legislature. *Id.* at 5.

Insertion of an inapplicable statute may be reversible error. *CRT, Inc. v. Dunn*, 248 Ark. 197, 451 S.W.2d 215 (1970). Similarly, portions of the statute, ordinance, or regulation not applicable to the facts in the case must be deleted. *Harkrider v. Cox*, 230 Ark. 155, 321 S.W.2d 226 (1959).

Research References

West's Key Number Digest
Automobiles ☞246(14)

Legal Encyclopedias
C.J.S., Motor Vehicles §§ 1450, 1455, 1494

AMI 904

RIGHT OF WAY—UNCONTROLLED INTERSECTION

When vehicles are approaching an intersection from different [*highways*] [*streets*], the driver of a motor vehicle must yield the right of way to another driver who, in the exercise of ordinary care, has already entered the intersection.

If vehicles are approaching an intersection from different [*highways*] [*streets*] at such relative speeds and distances from the intersection that both vehicles will enter the intersection at about the same time, then the law requires the driver of the vehicle on the left to yield the right of way to the vehicle on the right.

A violation of these rules governing the approach to an intersection, although not necessarily negligence, is evidence of negligence to be considered by you along with all of the other facts and circumstances in the case.

NOTE ON USE

This instruction should be followed by AMI 909. It is recommended that this instruction be given in lieu of Ark. Code Ann. § 27-51-501 in the format of AMI 903.

Do not use this instruction if an authorized emergency vehicle is involved. See AMI 913 and 914.

COMMENT

This instruction is based on Ark. Code Ann. § 27-51-501 and the holding in *Jarrett v. Matheney*, 236 Ark. 892, 370 S.W.2d 440 (1963).

The language of the instruction which provides that a motorist must exercise ordinary care in acquiring right of way is based on the holdings in *Menser v. Danner*, 219 Ark. 130, 240 S.W.2d 652 (1951), and *East v. Woodruff*, 209 Ark. 1046, 193 S.W.2d 664 (1946).

A private road is not a "highway" within the meaning of Arkansas

statutory rules of the road. In some instances the jury may have to decide whether a particular road is a "highway." *Glover v. Dixon*, 285 Ark. 140, 688 S.W.2d 930 (1985).

Research References

West's Key Number Digest
Automobiles ⇨246(9)

Legal Encyclopedias
C.J.S., Motor Vehicles §§ 1257, 1450, 1462, 1466, 1494

AMI 905

RIGHT OF WAY—STOP INTERSECTION

Drivers on different [*streets*] [*highways*] who are approaching an intersection which is protected by a stop sign have certain duties under the law.

The law requires that the driver of a vehicle approaching a stop sign shall stop, and, after having stopped, shall yield the right of way to any vehicle on the through [*street*] [*highway*] which has entered the intersection or which is approaching so closely as to constitute an immediate hazard. When [*he*][*she*] has so yielded and has time to move safely across the entire intersection [*he*][*she*] may then proceed, and the drivers of all other vehicles approaching the intersection shall yield the right of way to [*him*][*her*].

A driver using a through [*street*] [*highway*] has a right to assume, until the contrary is or reasonably should be apparent, that another driver will obey a stop sign, and acting on that assumption, [*he*][*she*] is not required to slow down or bring [*his*][*her*] vehicle under such control as to be able to stop in order to avoid a collision.

A violation of these rules of law governing right of way at a stop intersection, although not necessarily negligence, is evidence of negligence to be considered by you along with all the other facts and circumstances in the case.

NOTE ON USE

This instruction should be followed by AMI 909. It is recommended that this instruction be given in lieu of Ark. Code Ann. § 27-51-503(b) in the format of AMI 903.

Do not use this instruction if an authorized emergency vehicle is involved. See AMI 913 and 914.

COMMENT

The second paragraph of this instruction is based on Ark. Code Ann. § 27-51-503. The third paragraph of this instruction is based on the holding in *Shroeder v. Johnson*, 234 Ark. 443, 352 S.W.2d 570 (1962).

This instruction was cited with approval in *Lawson v. Stephens*, 241 Ark. 407, 407 S.W.2d 917 (1966).

A private road is not a "highway" within the meaning of Arkansas statutory rules of the road. In some instances the jury may have to decide whether a particular road is a "highway." *Glover v. Dixon*, 285 Ark. 140, 688 S.W.2d 930 (1985).

Research References

West's Key Number Digest
Automobiles ⇨246(9)

Legal Encyclopedias
C.J.S., Motor Vehicles §§ 1450, 1462, 1466, 1494

AMI 906

RIGHT OF WAY—FOUR-WAY STOP INTERSECTION

Drivers on different streets who are approaching an intersection which is protected by four-way stop signs have certain duties under the law.

The law requires that the driver of a vehicle approaching a stop sign at a four-way stop must stop and, having stopped, shall yield the right of way to another vehicle which, in the exercise of ordinary care, has already entered the intersection.

If vehicles are approaching a four-way stop intersection from different [*highways*] [*streets*] at such relative speeds and distances from the intersection that both vehicles will enter the intersection at the same time, or if both enter the intersection at the same time, the law requires the driver of the vehicle on the left to yield the right of way to the vehicle on the right.

A violation of these rules governing the approach to a four-way stop intersection, although not necessarily negligence, is evidence of negligence to be considered by you along with all of the other facts and circumstances in the case.

NOTE ON USE

This instruction should be followed by AMI 909. This instruction should be given in lieu of Ark. Code Ann. §§ 27-51-501, 27-51-503(b) and 27-51-601.

Do not use this instruction if an authorized emergency vehicle is involved. See AMI 913 and 914.

COMMENT

This instruction is based on Ark. Code Ann. §§ 27-51-501, 27-51-503(b) and 27-51-601.

Research References

West's Key Number Digest
Automobiles ⇨246(9)

Legal Encyclopedias
C.J.S., Motor Vehicles §§ 1257, 1450, 1462, 1466, 1494

AMI 907

RIGHT OF WAY—SIGNAL LIGHT INTERSECTION

Drivers on different [*streets*] [*highways*] who are approaching an intersection which is protected by a traffic control signal have certain duties under the law.

The law requires that the driver of a vehicle approaching a red light shall stop and shall not [*proceed through until the light changes to green*] [*turn right until [he][she] has yielded the right of way to vehicles approaching the intersection from the left*]. A driver approaching a green light has a right to assume, until the contrary is or reasonably should be apparent, that another driver will obey a red light and acting on that assumption [*he*][*she*] is not required to slow down or bring [*his*][*her*] vehicle under such control as to be able to stop in order to avoid a collision.

A violation of these rules of law governing right of way at an intersection controlled by a traffic control signal, although not necessarily negligence, is evidence of negligence to be considered by you along with all the other facts and circumstances in the case.

NOTE ON USE

If a yellow or caution light is involved, use Ark. Code Ann. § 27-52-107 or § 27-52-108 in the format of AMI 903.

If the driver of the vehicle with the red light is intending to turn right at an intersection where a right turn on a red light is permitted, use the language in the second bracketed phrase and also use AMI 909. Otherwise, use the language in the first bracketed phrase.

Research References

West's Key Number Digest
Automobiles ⇨246(9)

Legal Encyclopedias
C.J.S., Motor Vehicles §§ 1450, 1462, 1466, 1494

AMI 908

RIGHT OF WAY—YIELD INTERSECTION

Drivers on different *[streets]* *[highways]* who are approaching an intersection which is protected by a yield sign have certain duties under the law.

The driver of a vehicle approaching a yield sign shall slow down to a speed reasonable under existing conditions, or stop if necessary, and shall yield the right of way to any vehicle on the favored *[street]* *[highway]* which has entered the intersection or which is approaching so closely as to constitute an immediate hazard. When *[he]**[she]* has so yielded and has time to *[move safely across the entire intersection]* *[safely merge or turn right]*, *[he]**[she]* may then proceed, and the drivers of all other vehicles approaching the intersection shall yield the right of way to *[him]**[her]*.

A driver using a favored *[street]* *[highway]* has a right to assume, until the contrary is or reasonably should be apparent, that another driver will obey a yield sign, and acting on that assumption, *[he]**[she]* is not required to slow down or bring *[his]**[her]* vehicle under such control as to be able to stop in order to avoid a collision.

A violation of these rules governing right of way at an intersection where there is a yield sign, although not necessarily negligence, is evidence of negligence to be considered by you along with all of the other facts and circumstances in the case.

NOTE ON USE

Use the language in the second bracketed phrase if the driver with the yield sign is intending to merge or turn right. Otherwise use the language in the first bracketed phrase.

This instruction should be followed by AMI 909. It is recommended that this instruction be given in lieu of Ark. Code Ann. § 27-51-503(c) in the format of AMI 903.

Do not use this instruction if an authorized emergency vehicle is involved. See AMI 913 and 914.

COMMENT

This instruction is based on Ark. Code Ann. § 27-51-503(c).

Research References

West's Key Number Digest
Automobiles ⇨246(9)

Legal Encyclopedias
C.J.S., Motor Vehicles §§ 1257, 1450, 1462, 1466, 1494

AMI 909

**RIGHT OF
WAY—DEFINITION—ACQUISITION—USE**

When I use the term “right of way,” I mean the superior right to the immediate use of the [highway] [street]. One must exercise ordinary care in acquiring the right of way. In other words, the right of way cannot be acquired by negligent conduct. Once having obtained the right of way, a person must continue to use ordinary care to avoid injury or damage to [himself] [herself] or others.

NOTE ON USE

Use this instruction when the term “right of way” appears in another instruction.

COMMENT

This instruction is based in part on Ark. Code Ann. § 27-49-211.

The party first entering an intersection must be free of negligence in getting there in order to acquire the right of way. Jarrett v. Matheney, 236 Ark. 892, 370 S.W.2d 440 (1963); Menser v. Danner, 219 Ark. 130, 240 S.W.2d 652 (1951).

Research References

West's Key Number Digest
Automobiles Ⓒ246(9)

Legal Encyclopedias
C.J.S., Motor Vehicles §§ 1257, 1450, 1462, 1466, 1494

AMI 910

OPERATING UNSAFE VEHICLE

[No person shall drive] [No owner shall cause or knowingly permit to be driven or moved] on any [highway] [street] a [vehicle] [combination of vehicles] which is in such an unsafe condition as to endanger any person.

A violation of this rule, although not necessarily negligence, is evidence of negligence to be considered by you along with all of the other facts and circumstances in the case.

NOTE ON USE

If the particular mechanical defect involved in the case is the subject of a more specific provision contained in Ark. Code Ann. Title 27, this instruction should not be used. Instead, AMI 903 should be used with the applicable statute quoted in the instruction.

COMMENT

This instruction is based upon and substantially incorporates the language of Ark. Code Ann. §§ 27-36-101 and 27-37-101. In *Bryant v. Thomas*, 230 Ark. 999, 328 S.W.2d 83 (1959), the Court approved an instruction identical in substance with this instruction. It is not necessary to prove prior knowledge of the defect on the part of the operator of an unsafe vehicle for this instruction to be given. *Brand v. Rorke*, 225 Ark. 309, 280 S.W.2d 906 (1955).

It is error to give this instruction without evidence that the defective condition of the vehicle was a proximate cause of the accident. *Thomas v. Kellett*, 260 Ark. 548, 542 S.W.2d 501 (1976).

Research References

West's Key Number Digest
Automobiles ◊246(18)

Legal Encyclopedias
C.J.S., Motor Vehicles §§ 1450, 1470, 1494

AMI 911

**PEDESTRIANS AND MOTORISTS—COMMON
RIGHT TO USE THE STREETS AND HIGHWAYS**

Streets and highways are available for the use of both pedestrians and motorists. The driver of a motor vehicle must anticipate the presence of pedestrians on streets and highways and use ordinary care to avoid injuring them. Pedestrians are required to anticipate the presence of motor vehicles and to use ordinary care for their own safety.

COMMENT

This instruction is based on the holdings in *Williamson v. Garrigus*, 228 Ark. 705, 310 S.W.2d 8 (1958) (pedestrian jaywalking), and *Haralson v. Jones Truck Line*, 223 Ark. 813, 270 S.W.2d 892 (1954) (pedestrian on highway). It cannot be said as a matter of law that it is negligent to walk in the street where there is no sidewalk. *Yocum v. Holmes*, 222 Ark. 251, 258 S.W.2d 535 (1953).

It was error to refuse this instruction in a wrongful death action arising from death of a 13-month-old child who had wandered into the street and was struck by defendant's automobile. *Moore v. Rye*, 255 Ark. 469, 500 S.W.2d 751 (1973). See *Thomas v. Newman*, 262 Ark. 42, 49, 553 S.W.2d 459, 463 (1977) ("A person operating a vehicle and seeing children ahead must exercise care . . . commensurate with the danger to be anticipated.").

That the defendant, driving at night with his headlights on bright, did not see a pedestrian near the center line of the highway until just before the pedestrian was struck by the left front fender and headlight was evidence that the driver was not keeping a proper lookout for pedestrians. *Kelly v. Cessna*, 282 Ark. 408, 668 S.W.2d 944 (1984).

Research References

West's Key Number Digest
Automobiles ¶246(4)

Legal Encyclopedias
C.J.S., Motor Vehicles §§ 1450, 1461 to 1462, 1494

AMI 912

PASSENGER—DUTY TO USE ORDINARY CARE

A passenger in an automobile [or other vehicle] is required to use ordinary care for [his][her] own safety.

COMMENT

The court has held it to be proper to refuse this instruction in the following situations: where there was not sufficient time for a warning by passengers to the driver, even assuming such a warning ought to have been given, to have been completed much less to have prevented the head-on accident or reduced its consequences, *Reed v. McGibboney*, 243 Ark. 789, 422 S.W.2d 115 (1967); where there was no evidence that the driver of an approaching automobile saw, or reasonably should have seen, the danger of a stalled logging truck on the highway and therefore no evidence that passengers' failure to warn the driver was a proximate cause of the rear-end accident, *Johnson Timber Corp. v. Sturdivant*, 295 Ark. 622, 752 S.W.2d 241 (1988).

The court held it to be proper to give this instruction in a case in which the passenger was lying down in the back of a van, "not paying attention to anything," even though he was "unable to see from that position." *Kyser v. Porter*, 261 Ark. 351, 357–358, 548 S.W.2d 128, 131–132 (1977). For a comparison of a passenger's duty with that of a driver, see *St. Louis Southwestern Ry. Co. v. Pennington*, 261 Ark. 650, 553 S.W.2d 436 (1977).

For discussion of the obligations of passengers when (a) riding with intoxicated drivers and (b) left in a vehicle parked in a position of peril, see *Poole v. James*, 231 Ark. 810, 332 S.W.2d 833 (1960).

For an early application of the principle reflected in this instruction, and for a discussion of the distinction between imputed negligence of the driver and the passenger's own duty of care for the passenger's safety, see *Lowden v. Quimby*, 192 Ark. 307, 90 S.W.2d 984 (1936).

Research References

West's Key Number Digest
Automobiles ¶246(2.1)

Legal Encyclopedias
C.J.S., Motor Vehicles §§ 1450 to 1451, 1462, 1494

AMI 913

EMERGENCY VEHICLES—SPECIAL PRIVILEGES

(1) [The *(ambulance) (fire truck) (police car)* driven by _____ was an authorized emergency vehicle at the time and place of the occurrence,]

* * *

(2) [One issue you must decide is whether the *(ambulance) (fire truck) (police car)* was an authorized emergency vehicle at the time and place of the occurrence. If you find that _____ was *(responding to an emergency call) (in the immediate pursuit of an actual or suspected law violator)* and was operating the *(siren) (bell) (whistle)* and *(red) (blue)* rotating or flashing emergency lights on the *(ambulance) (fire truck) (police car)* which *[he][she]* was driving, then the *(ambulance) (fire truck) (police car)* was an authorized emergency vehicle,] and the driver was entitled to operate the vehicle in accordance with the following traffic law(s) applicable only to emergency vehicles:

- (a) [The driver of an emergency vehicle is relieved of the obligation to obey a speed limit.]
- (b) [The driver of an emergency vehicle is not required to stop at a stop *(light) (sign)* but must slow down as necessary for safety and may then proceed cautiously past the signal.]
- (c) [The driver of an emergency vehicle is not required to stop at the type of railroad crossing involved in this case.]

(d) [An emergency vehicle has the right of way over other vehicles.]

The existence of [this] [these] privilege(s) does not relieve the driver of an emergency vehicle of the duty to exercise ordinary care for the safety of others using the [street] [highway].

NOTE ON USE

Use paragraph (1) only when there is no dispute as to emergency vehicle status. Appropriate revisions should be made in the instruction if there is a dispute about the existence or the sufficiency of the signal equipment as required by Ark. Code Ann. § 27-37-202 or § 27-49-219(d) and which may partially supersede § 27-37-202. Use the reference to red emergency lights when the status of an ambulance or fire truck is in dispute, and refer to blue emergency lights in the case of a police car. *Ibid.* Appropriate revisions should be made in the instruction if there is a question whether an ambulance meets the requirements of § 27-49-219(d), or an issue under the same act with regard to motor vehicles operated by volunteer firemen.

COMMENT

The court held that the standard of care set out in this instruction is a correct statement of law in *City of Little Rock v. Weber*, 298 Ark. 382, 767 S.W.2d 529 (1989), and quoted it with approval in *City of Caddo Valley v. George*, 340 Ark. 203, 9 S.W.3d 481 (2000).

Authorized emergency vehicles are defined in Ark. Code Ann. § 27-49-219(d) as including: fire department vehicles, police vehicles, vehicles owned and used by volunteer fire fighters while engaged in official duties, and ambulances and other emergency medical vehicles meeting statutory requirements.

An auxiliary police officer's private vehicle, equipped with a flashing red light, is not an emergency vehicle, and it was proper for the trial court to refuse to give a modified version of this instruction. *Jones v. Parrish*, 330 Ark. 521, 954 S.W.2d 934 (1997).

It was reversible error to give the jury a modified version of this instruction to the effect that a police motorcycle that gave "an appropriate audible signal," as opposed to the statutorily required siren, qualified as an authorized emergency vehicle. *Whistle-Vess Bottling Co. v. Owens*, 249 Ark. 424, 459 S.W.2d 562 (1970).

The various privileges for emergency vehicles are set forth in the following statutes:

Exemption from prima facie speed limitations, Ark. Code Ann. §§ 27-51-202(a) and 27-51-204(b)(1).

Privilege to proceed cautiously past stop lights and stop signs after slowing, Ark. Code Ann. § 27-49-109.

Privilege providing statutory right-of-way, Ark. Code Ann. §§ 27-37-202(e) and 27-51-901.

Research References

West's Key Number Digest

Automobiles Ⓒ246(2), 246(21)

Legal Encyclopedias

C.J.S., Motor Vehicles §§ 1257 to 1258, 1261, 1450 to 1451, 1454, 1459 to 1462, 1464 to 1467, 1494

AMI 914

**EMERGENCY VEHICLES—DUTY OF DRIVERS OF
OTHER VEHICLES**

When the approach of an authorized emergency vehicle is imminent, the driver of every other vehicle shall yield the right-of-way and *[except when otherwise directed by a police officer]* immediately drive to a position parallel to, and as close as possible to, the right hand *[edge] [curb]* of the *[highway] [street]* clear of any intersection, where *[he][she]* shall stop and remain until the authorized emergency vehicle has passed.

NOTE ON USE

This instruction should be given in lieu of Ark. Code Ann. §§ 27-37-202 and 27-51-901(a) in the format of AMI 903.

COMMENT

This instruction is based on Ark. Code Ann. §§ 27-37-202 and 27-51-901(a).

It was reversible error to give this instruction when the only signal given by a police officer on a police motorcycle was to blow his horn, rather than to sound his siren, and thus there was no evidence that the motorcycle qualified as an authorized emergency vehicle. *Whistle-Vess Bottling Co. v. Owens*, 249 Ark. 424, 459 S.W.2d 562 (1970).

Research References

West's Key Number Digest
Automobiles ⇨246(2)

Legal Encyclopedias
C.J.S., Motor Vehicles §§ 1257 to 1258, 1450 to 1451, 1459 to 1462, 1464 to 1467, 1494

CHAPTER 10

PRODUCTS LIABILITY

Table of Instructions

AMI

- 1001. Products Liability—Negligence—Duty of Manufacturer—General.
- 1002. Products Liability—Negligence—Manufacturer's Duty to Warn.
- 1003. Products Liability—Negligence—Manufacturer's Duty to Instruct.
- 1004. Products Liability—Negligence—Vendor Assuming Role of Manufacturer.
- 1005. Products Liability—Negligence—Vendor's Duty to Warn.
- 1006. Products Liability—Negligence—Vendor's Duty to Inspect.
- 1007. Products Liability—Negligence—Duty of Vendor of Food.
- 1008. Products Liability—Issues—Strict Liability in Tort—Burden of Proof.
- 1009. Products Liability—Issues—Defenses—Unavoidably Unsafe Products.
- 1010. Products Liability—Issues—Breach of Implied Warranty of Merchantability—Burden of Proof.
- 1011. Products Liability—Issues—Breach of Implied Warranty of Fitness for Particular Purpose.
- 1012. Products Liability—Issues—Breach of Express Warranty.
- 1013. Products Liability—Issues—Claims Involving Two or More Theories of Liability.
- 1014. Products Liability—Issues—Comparative Fault—Evidence.
- 1015. Products Liability—Issues—Compliance with Law.
- 1016. Definition and Inference—Defective Condition
- 1017. Definition—Unreasonably Dangerous.

AMI 1001

PRODUCTS LIABILITY—NEGLIGENCE—DUTY OF
MANUFACTURER—GENERAL

A manufacturer of a (product) has a duty to use ordinary care *[in its design] [and] [in the selection of the materials used in it] [and] [in its assembly] [and] [to inspect it] [and] [to test it] [and] [to package it]* in order to protect those *[who will use it] [who are in the area of its use]* from unreasonable risk of harm *[while it is being used for its intended purpose] [or] [while it is being used for any purpose which should reasonably be expected by the manufacturer].*

[A manufacturer is not relieved of the duty to use ordinary care in the design of a product merely because the dangerous feature is clearly exposed to those using the product.]

In determining whether (manufacturer) was negligent, you may consider the degree of skill and care ordinarily possessed and used by manufacturers doing work of a nature similar to that shown by the evidence in this case.

NOTE ON USE

Foreseeability is frequently an issue in products liability cases. In these instances, AMI 302 should be given in its entirety.

COMMENT

This instruction is based on the Arkansas Product Liability Act of 1979 (Ark. Code Ann. §§ 16-116-101 et seq.).

The bracketed paragraph is based upon the holding in *Forrest City Machine Works, Inc. v. Aderhold*, 273 Ark. 33, 616 S.W.2d 720 (1981), in which the court determined that “[m]anufacturers in Arkansas are not and should not be relieved of the duty to exercise due care in the

design and manufacture of equipment merely because the dangerous feature is clearly exposed to those foreseeably using the machine."

For a discussion of the history of products liability causes of action, see *International Harvester Co. v. Land*, 234 Ark. 682, 354 S.W.2d 13 (1962), in which the court held that, in these types of cases, it is for the jury to decide whether the manufacturer took the proper precautions to protect users from harm or whether, by design and manufacture, the manufacturer subjected users to an unreasonable risk of harm.

Circumstantial evidence may be offered to support a claim. When a litigant relies in whole or in part on circumstantial evidence, it is proper for the court to define circumstantial evidence for the jury. *Ford Motor Co. v. Fish*, 233 Ark. 634, 346 S.W.2d 469 (1961); AMI 108 (defining circumstantial evidence).

The doctrine of *res ipsa loquitur* was held not applicable to a case where the allegedly defective product was not under the exclusive control of either the installer or manufacturer for a ten-month period prior to the alleged accident. *Kapp v. Bob Sullivan Chevrolet Co.*, 234 Ark. 395, 353 S.W.2d 5 (1962); AMI 609 (instructing on *res ipsa loquitur*). See also *Green v. Equitable Powder Mfg. Co.*, 95 F. Supp. 127 (W.D. Ark. 1951) (discussing the applicability of *res ipsa loquitur* to this type of action). For an instruction on circumstantial evidence see AMI 1016.

No showing of privity is necessary in a negligence action between the manufacturer and the plaintiff; the test is foreseeability of probable injury. Ark. Code Ann. § 4-86-101. See *International Harvester Co.*, *supra*; *Chapman Chem. Co. v. Taylor*, 215 Ark. 630, 222 S.W.2d 820 (1949).

Research References

West's Key Number Digest
Products Liability ¶422

Legal Encyclopedias

C.J.S., Motor Vehicles §§ 492 to 493; Products Liability §§ 280 to 291

AMI 1002

**PRODUCTS LIABILITY—NEGLIGENCE—
MANUFACTURER'S DUTY TO WARN**

A manufacturer of a _____ has a duty to give a
(product)
reasonable and adequate warning of dangers *[inherent] [or] [reasonably foreseeable]* in its use *[(for a purpose) (and) (in a manner) that the manufacturer should reasonably foresee]*. A violation of this duty is negligence. There is no duty, however, to warn a user of obvious dangers or those known to *[him][her]* or those which *[he][she]* should reasonably discover for *[himself][herself]*.

COMMENT

"[T]he manufacturer . . . is not required to foresee that someone might be affected because of his [or her] peculiar sensitivities to the substance causing the injury." *Vanoven v. Hardin*, 233 Ark. 301, 306, 344 S.W.2d 340, 343 (1961) (affirming a directed verdict for defendant when plaintiff developed dermatitis resulting from an allergy to the defendant's insecticide when neither plaintiff nor defendant was aware of the allergy previously).

The duty to warn may extend beyond the purchaser of a manufacturer's product to an ultimate user. *Hopkins v. Chip-In-Saw*, 630 F.2d 616, 619 (8th Cir. 1980) (examining the scope of the duty and corresponding jury instructions).

For the distinction between (1) the inapplicability of the "patent danger" doctrine to negligent design claims, (2) the inapplicability of the "open and obvious danger" doctrine to failure-to-warn claims, and (3) comparative fault and assumption of risk, see *Forrest City Mach. Works, Inc. v. Aderhold*, 273 Ark. 33, 616 S.W.2d 720 (1981).

In *Hergeth, Inc. v. Green*, 293 Ark. 119, 123–24, 733 S.W.2d 409, 411 (1987), the court properly instructed the jury on the manufacturer's duty to warn. Given the disputed facts, the court could not say as a matter of law that the danger presented in the case was open and obvious. In *Larson Mach., Inc. v. Wallace*, 268 Ark. 192, 206–12, 600 S.W.2d 1, 9–11 (1980), the court found that the alleged hazardous condition was not open and obvious and, therefore, upheld a jury verdict against the dealer on a failure to warn claim. The court determined

that an independent intervening cause precluded liability for negligence on the part of the manufacturer when the dealer modified the product and thus created a danger which did not exist at the time it left the control of the manufacturer.

In certain cases, the learned intermediary doctrine applies under Arkansas law. The doctrine provides that a drug manufacturer may rely on the prescribing physician to warn the ultimate consumer of the risks of a prescription drug. *See West v. Searle & Co.*, 305 Ark. 33, 42, 806 S.W.2d 608, 612 (1991) (applying the doctrine in case of oral contraceptives).

Failure-to-warn claims against manufacturers of generic drugs alleging that state tort law requires a label different from that used on the corresponding brand-name drug label provided to physicians are preempted by federal law, which requires manufacturers of generic drugs to use the same safety and efficacy labels as the brand-name manufacturer. *PLIVA, Inc. v. Mensing*, — U.S. —, 131 S. Ct. 2567, 2577–78 (2011). Failure-to-warn claims against brand-name manufacturers, however, are not preempted. *See PLIVA, Inc.*, 131 S. Ct. at 2581 (distinguishing *Wyeth v. Levine*, 555 U.S. 555, 572–73 (2009)). For application of *Mensing* under Arkansas's learned intermediary doctrine, *see Bell v. PLIVA, Inc.*, 845 F. Supp. 2d 967, No. 5:10CV00101, 2012 WL 640742, at *3–4 (E.D. Ark. Feb. 16, 2012) (holding failure-to-warn claim preempted).

Research References

West's Key Number Digest
Products Liability ⇨422, 427

Legal Encyclopedias
C.J.S., Motor Vehicles §§ 492 to 493; Products Liability §§ 280 to 291

AMI 1003

**PRODUCTS LIABILITY—NEGLIGENCE—
MANUFACTURER'S DUTY TO INSTRUCT**

A manufacturer of a _____ has a duty to give reasonable and adequate instructions with respect to the conditions and methods of its safe use when danger is reasonably foreseeable in its use, unless the danger is known to the user or is reasonably discoverable by [him][her]. A violation of this duty is negligence.

COMMENT

If a product can be used safely by observing precautions that the user knows or reasonably should know, the manufacturer may not be liable for damage resulting from negligent use based on a failure-to-instruct theory. *Walton v. Sherwin-Williams Co.*, 191 F.2d 277, 282 (8th Cir. 1951).

The duty to warn or instruct may extend beyond the purchaser of a manufacturer's product to an ultimate user. *Hopkins v. Chip-In-Saw*, 630 F.2d 616, 619 (8th Cir. 1980) (examining the scope of the duty and corresponding jury instructions).

For the distinction between (1) the inapplicability of the "patent danger" doctrine to negligent design claims, (2) the inapplicability of the "open and obvious danger" doctrine to failure-to-warn claims, and (3) comparative fault and assumption of risk, see *Forrest City Mach. Works, Inc. v. Aderhold*, 273 Ark. 33, 616 S.W.2d 720 (1981).

In certain cases, the learned intermediary doctrine applies under Arkansas law. The doctrine provides that a drug manufacturer may rely on the prescribing physician to warn the ultimate consumer of the risks of a prescription drug. See *West v. Searle & Co.*, 305 Ark. 33, 42, 806 S.W.2d 608, 612 (1991) (applying the doctrine in case of oral contraceptives).

Research References

West's Key Number Digest
Products Liability ¶422, 427

Legal Encyclopedias
C.J.S., Motor Vehicles §§ 492 to 493; Products Liability §§ 280 to 291

AMI 1004

**PRODUCTS LIABILITY—NEGLIGENCE—VENDOR
ASSUMING ROLE OF MANUFACTURER**

One who puts out as *[his][her][its]* own a
(product)
manufactured by another is subject to the same liability as though *[he][she][it]* were its manufacturer.

NOTE ON USE

This instruction should be followed by the appropriate instructions as to a manufacturer's liability.

Do not use this instruction when the case is submitted on interrogatories.

COMMENT

One who puts out a product as his own which is manufactured by another is subject to the same liability as the manufacturer. *Dildine v. Clark Equip. Co.*, 282 Ark. 130, 666 S.W.2d 692 (1984), *appeal after remand*, 285 Ark. 325, 686 S.W.2d 791 (1985) (because the owners' manual, the warranty, the operators' handbook, other documents accompanying the machine, and the machine itself all showed the product to be manufactured by one company, there was no evidence on which to predicate liability as to another company); *Green v. Equitable Powder Mfg. Co.*, 95 F. Supp. 127 (W.D. Ark. 1951) (examining this issue in the context of business relations between the manufacturer and dealer); *Chapman Chem. Co. v. Taylor*, 215 Ark. 630, 222 S.W.2d 820 (1949) (there was sufficient evidence on which to predicate liability as to Chapman Chemical Company, the distributor of a chemical produced by another, but which Chapman put out as its own, either under its own label or unlabelled but as its own).

Research References

West's Key Number Digest
Products Liability ⇨422, 427

Legal Encyclopedias
C.J.S., Motor Vehicles §§ 492 to 493; Products Liability §§ 280 to 291

AMI 1005

PRODUCTS LIABILITY—NEGLIGENCE—VENDOR'S
DUTY TO WARN

One who sells a _____ which [he][she][it] knows
(product)
or has reason to know is likely to be dangerous when
used in the manner or for the purpose for which it
was designed has a duty to give a reasonable and ad-
equate warning of that danger. A violation of this duty
is negligence. There is no duty, however, to warn a
user of obvious dangers or of those known to
[him][her] or of those which [he][she] should reason-
ably discover for [himself][herself].

COMMENT

In *Lilly v. J. A. Riggs Tractor Co.*, 238 Ark. 1027, 386 S.W.2d 488 (1965), plaintiff's widow and estate filed suit after his death against J.A. Riggs Tractor Co., an authorized dealer of the allegedly defective machine, which had entered into negotiations with plaintiff's employer for the sale of the machine and provided the machine for plaintiff's and his employer's use.

For the distinction between (1) the inapplicability of the "patent danger" doctrine to negligent design claims, (2) the inapplicability of the "open and obvious danger" doctrine to failure to warn claims, and (3) comparative fault and assumption of risk, see *Forrest City Mach. Works, Inc. v. Aderhold*, 273 Ark. 33, 616 S.W.2d 720 (1981).

In *Cheatam v. Teva Pharmaceuticals USA*, 726 F.Supp.2d 1021, 1023-24 (E.D. Ark. 2010), the court ruled that the publisher of patient drug information included with the prescription drug owed no duty to warn the product liability plaintiff.

Research References

West's Key Number Digest
Products Liability ⇨422, 427

Legal Encyclopedias
C.J.S., Motor Vehicles §§ 492 to 493; Products Liability §§ 280 to 291

AMI 1006

**PRODUCTS LIABILITY—NEGLIGENCE—VENDOR'S
DUTY TO INSPECT**

Ordinarily a seller does not have a duty to inspect a product for possible defects. If, however, a seller has reason to believe that the product is defective or is likely to have a defect which would make it dangerous when used for a purpose or in a manner which the seller should reasonably foresee, then the seller has a duty to make a reasonable inspection of the product to protect those *[who will use it] [and] [who are in the area of its use]* from unreasonable risk of harm. A violation of this duty is negligence.

NOTE ON USE

Use AMI 1007 in food or beverage cases.

COMMENT

In *Ahrens v. Moore*, 206 Ark. 1035, 178 S.W.2d 256 (1944), the court determined there were fact questions for the jury regarding the duty owed by a dealer who claimed to sell a new and experimental product not in general use, who may have had knowledge of the product's dangerous qualities based on experience unique to the dealer, and who made representations regarding the fitness and quality of the product. In *Sinclair Refining Co. v. Henderson*, 197 Ark. 319, 122 S.W.2d 580 (1938), the court applied this standard to the defendant seller.

For a general discussion of this proposition, see *Green v. Equitable Powder Mfg. Co.*, 95 F.Supp. 127 (W.D. Ark. 1951). Even when such a duty is imposed, there must be sufficient evidence to support a finding of negligence on the part of the seller. See, e.g., *Williams v. Oklahoma Tire & Supply Co.*, 85 F. Supp. 260 (W.D. Ark. 1949), *rev'd on other grounds*, 181 F.2d 675 (8th Cir. 1950).

Research References

West's Key Number Digest
Products Liability Ⓒ422

Legal Encyclopedias
C.J.S., Motor Vehicles §§ 492 to 493; Products Liability §§ 280 to 291

AMI 1007

**PRODUCTS LIABILITY—NEGLIGENCE—DUTY OF
VENDOR OF FOOD**

A seller of _____ has a duty to use
(food, beverages, drugs, etc.)
ordinary care to sell [wholesome] products [packed by reliable manufacturers] [and] [without impurities that are reasonably discoverable]. A violation of this duty is negligence.

COMMENT

"The retailer is not a guarantor. . . . He must exercise such care as a person of ordinary prudence would exercise under the same or similar circumstances for the protection of customers against impurities or contamination that would be discoverable by the exercise of such care." H.J. Heinz Co. v. Duke, 196 Ark. 180, 116 S.W.2d 1039, 1042 (1938). See Kraft-Phenix Cheese Corp. v. Spelce, 195 Ark. 407, 113 S.W.2d 476 (1938) (applying this standard to dealer when plaintiff complained of injury from eating sandwich spread containing glass); Green v. Wilson, 194 Ark. 165, 105 S.W.2d 1074 (1937) (dismissing plaintiff's claim against retailer of allegedly defective pie because there was insufficient evidence of a violation of this duty; plaintiff observed pie taken from original packaging of the manufacturer and cut by the retailer); Kroger Grocery & Baking Co. v. Melton, 193 Ark. 494, 102 S.W.2d 859 (1937) (examining the level of proof necessary to support an inference of the retailer's negligence); Lewis v. Roescher, 193 Ark. 161, 98 S.W.2d 956 (1936) (applying this standard); Kroger Grocery & Baking Co. v. Turner, 193 Ark. 227, 100 S.W.2d 82 (1936) (affirming verdict against retailer when evidence demonstrated the product was unwholesome, the product was the cause of plaintiff's illness, and the retailer knew of product's unwholesome character before the sale).

In the handling or sale of standard packaged goods, inspection is not required, expected, or anticipated by the dealer when such inspections could not be made without destroying or damaging the package's protective coverings. Great Atlantic & Pac. Tea Co. v. Gwilliams, 189 Ark. 1037, 76 S.W.2d 65, 69 (1934). See also Campbell Soup Co. v. Gates, 319 Ark. 54, 889 S.W.2d 750 (1994) (reversing and dismissing a judgment against the manufacturer, concluding that larvae present in the packaged and prepared product were not enough to assign liability to the manufacturer when evidence was insufficient to show product was in a defective condition at the time it left the care, custody, and control of the manufacturer); Coca-Cola Bottling Co. v. Swilling, 186 Ark. 1149, 57 S.W.2d 1029 (1933) (buyer of bottled soft drink containing

partially decomposed centipede had no cause of action against seller for not inspecting bottle).

The duty of the seller of animal food is the same. *Kroger Grocery & Baking Co. v. Woods*, 205 Ark. 131, 167 S.W.2d 869 (1943).

Research References

West's Key Number Digest

Food ¶25.27; Products Liability ¶422.

Legal Encyclopedias

C.J.S., Food §§ 70 to 91

AMI 1008

**PRODUCTS LIABILITY—ISSUES—STRICT
LIABILITY IN TORT—BURDEN OF PROOF**

 claims damages from and has the
(Plaintiff) (defendant)
burden of proving each of four essential propositions:

First: That *[he][she]* has sustained damages;**

**Second: That was engaged in the busi-
(defendant)
ness of *[manufacturing]* *[or]* *[assembling]* *[or]* *[sell-
ing]* *[or]* *[leasing]* *[or]* *[]* ;
(otherwise distributing) (product)**

**Third: That the was supplied by in a
(product) (defendant)
defective condition which rendered it unreasonably
dangerous; and**

**Fourth: That the defective condition was a proximate cause of 's damages.
(plaintiff)**

**[If you find from the evidence in this case that each of these propositions has been proved, then your verdict should be for (against the party or
(plaintiff)
parties found to be liable); but if, on the other hand, you find from the evidence that any of the propositions has not been proved, then your verdict should be for .]
(defendant)**

NOTE ON USE

If two or more theories of liability are involved use AMI 1013.

Do not use the first bracketed paragraph when there is proof of a specific defect.

Do not use the final bracketed paragraph when affirmative defenses such as unforeseeable misuse are in issue. See, e.g., AMI 1014.

Do not use the final bracketed paragraph if the case is submitted on interrogatories.

For definition of “defective condition,” see AMI 1016. For definition of “unreasonably dangerous,” see AMI 1017.

For an instruction regarding proof by circumstantial evidence that the product was in a defective condition, see AMI 1016.

COMMENT

This instruction was cited with approval in *Mason v. Mitcham*, 2011 Ark. App. 189, at 4.

This instruction is based on Ark. Code Ann. § 4-86-102. For discussion of the background of this doctrine see RESTATEMENT (SECOND) OF TORTS § 402(a). These elements were recited in *West v. Searle & Co.*, 305 Ark. 33, 37, 806 S.W.2d 608, 610 (1991), *appeal after remand*, 317 Ark. 525, 879 S.W.2d 412 (1994), and *E.I. DuPont De Nemours & Co. v. Dillaha*, 280 Ark. 477, 480, 659 S.W.2d 756, 757 (1983).

Definitions of the terms “manufacturer,” “product,” “supplier,” “defective condition,” “product liability action,” “anticipated life,” and “unreasonably dangerous” are found in Ark. Code Ann. § 16-116-102. AMI 1016 contains a definitional instruction for “defective condition” and AMI 1017 contains one for “unreasonably dangerous.” See *Berkeley Pump Co. v. Reed-Joseph Land Co.*, 279 Ark. 384, 653 S.W.2d 128 (1983), for a discussion of the “unreasonably dangerous” requirement. For analysis of the requirement that the product be “defective,” see *Elk Corp. of Ark. v. Jackson*, 291 Ark. 448, 725 S.W.2d 829 (1987), *opinion supplemented on denial of reh’g*, 291 Ark. 448, 727 S.W.2d 856 (1987) (discussing whether the alleged defect involved packaging).

It is “an essential constituent of proof” required under the statute that “the product was in a defective condition at the time it left the hands of the particular seller.” *Yielding v. Chrysler Motor Co.*, 301 Ark. 271, 274–75, 783 S.W.2d 353, 355–56 (1990). See *Campbell Soup Co. v. Gates*, 319 Ark. 54, 889 S.W.2d 750 (1994) (same).

Proof of a specific defect is normally required, unless “common sense tells us that the accident would not have occurred in the absence of a defect.” *Harrell Motors, Inc. v. Flanery*, 272 Ark. 105, 612 S.W.2d 727 (1981). See also *Yielding*, 301 Ark. at 274–77, 783 S.W.2d at 355–56 (recognizing doctrine but affirming grant of summary judgment on other grounds); *Williams v. Smart Chevrolet Co.*, 292 Ark. 376, 730 S.W.2d 479 (1987) (applying doctrine and finding its predicates not met); *Higgins v. Gen. Motors Corp.*, 287 Ark. 390, 699 S.W.2d 741 (1985) (same); *S. Co. v. Graham*, 271 Ark. 223, 607 S.W.2d 677 (1980) (upholding applica-

tion of doctrine). For the case to proceed to the jury on such a theory, the plaintiff must produce evidence that tends to negate other causes of the observed product failure. *Williams*, 292 Ark. at 382-84, 730 S.W.2d at 482-83; *Higgins*, 287 Ark. at 392, 699 S.W.2d at 743; *Campbell Soup*, 319 Ark. at 60-62, 889 S.W. at 753-54 (presence of beetle larvae in noodle packets more than a month after manufacture and shipment held not sufficient to negate other causes). See also *Kaplon v. Howmedica, Inc.*, 83 F.3d 263, 266-67 (8th Cir. 1996) (concluding that evidence was insufficient to negate other causes for failure of orthopedic device). For a case noting that the plaintiff is not required to negate other causes when there is proof of a defect, see *Nationwide Rentals Co., Inc. v. Carter*, 298 Ark. 97, 104, 765 S.W.2d 931, 935 (1989). For an instruction on this issue, see AMI 1016. X

Arkansas has amended its products liability statute to exempt from the definition of "product" real estate and improvements located on real estate. Ark. Code Ann § 4-86-102(c)(2)(A). The amendment contains two exceptions to this exemption: "Any tangible object or good produced that is affixed to, installed on, or incorporated into real estate or any improvements on real estate" are considered to be "products" under the statute. *Id.* at § 4-86-102(c)(2)(B). Further, "[i]f environmental contaminants exist or have occurred in an improvement on real estate," the improvements are considered "products" under the statute. *Id.* at § 4-86-102(c)(2)(C). Before that amendment, the courts had ruled that a street in a residential subdivision is not a "product." *Milam v. Midland Corp.*, 282 Ark. 15, 665 S.W.2d 284 (1984); *Englehardt v. Rogers Group, Inc.*, 132 F. Supp. 2d 757, 759-60 (E.D. Ark. 2001) (granting summary judgment on basis, inter alia, that a highway is not a "product" under the Arkansas products liability statute).

Intervening negligent acts of a third party do not avoid liability "unless the third party's negligence is the sole proximate cause of the injury. If the intervening act is a normal response to the situation created by the original actor's conduct, then there is no intervening cause." *Nationwide Rentals Co., Inc.*, 298 Ark. at 101-02, 765 S.W.2d at 934 (reviewing cases).

The duty to warn the ultimate user of the product's risk generally exists under either a negligence or strict liability theory. *West*, 305 Ark. at 42, 806 S.W.2d at 613; *Lee v. Martin*, 74 Ark. App. 193, 200 45 S.W.3d 860, 865 (2001). "If a plaintiff meets his initial burden of proving that a warning is inadequate, a presumption arises that he would have read and heeded an adequate warning; however, the presumption may be rebutted by evidence that an adequate warning would have been futile under the circumstances." *Lee*, 74 Ark. App. at 200, 45 S.W.3d at 865 (citing *Bushong v. Garman Co.*, 311 Ark. 228, 843 S.W.2d 807 (1992)). An exception to the duty to warn is the "learned intermediary" doctrine, under which "a drug manufacturer may rely on the prescribing physician to warn the ultimate consumer of the risks of a prescription drug." *West*, 305 Ark. at 42, 806 S.W.2d at 613 (applying learned intermediary doctrine to oral contraceptives).

Damages for economic loss may be recoverable under strict products liability in the absence of any personal injury or any damage to property other than the product, provided that the defective product is unreasonably dangerous such that it poses an actual danger to persons or property. *See Berkeley Pump*, 279 Ark. at 390-91, 653 S.W.2d at 131 (concluding that irrigation pumps that failed to pump an adequate volume of water were not unreasonably dangerous); *Farm Bureau Ins. Co. v. Case Corp.*, 317 Ark. 467, 471-73, 878 S.W.2d 741, 744 (1994) (concluding that a tractor that caught fire was unreasonably dangerous); *Alaskan Oil, Inc. v. Cent. Flying Serv.*, 975 F.2d 553, 555 (8th Cir. 1992) (affirming the jury's finding that a plane, which had never crashed but had a history of corrosion problems, was unreasonably dangerous).

Research References

West's Key Number Digest
Products Liability $\S\S$ 438 to 441

Legal Encyclopedias
C.J.S., Motor Vehicles $\S\S$ 492 to 493; Products Liability $\S\S$ 280 to 291

AMI 1009

**PRODUCTS LIABILITY—ISSUES—DEFENSES—
UNAVOIDABLY UNSAFE PRODUCTS**

 contends that the was not in a
(Defendant) (product)
defective condition which rendered it unreasonably
dangerous, because the was unavoidably
(product)
unsafe. has the burden of proving each of
(Defendant)
four essential propositions:

First: That the was *[manufactured] [com-*
(product)
pounded] [assembled] [or] [packaged] as designed;

Second: That the was *[intended to be used*
(product)
under the direction of a prescribing physician who
was] supplied with adequate warnings of potential
dangers inherent in its intended or foreseeable uses;

Third: That there was no feasible alternative
which accomplishes the intended purpose of ,
(product)
at a lesser risk. In determining whether such feasible
alternative exists, you should consider:

(a) The magnitude of the risk from intended
or foreseeable uses of the which risk the
(product)
alternative avoids;

(b) The comparative costs of the and
(product)
the alternative;

(c) The respective benefits of the and
(product)
the alternative; and

(d) The relative safety of the _____ and the
(product)
alternative.

And fourth: That the benefit of _____ apparently
(product)
outweighed the risk at the time of distribution, considering the value of the benefit, the seriousness of the risk, and the likelihood of both benefit and risk.

[If you find that each of these four essential propositions has been proved, then you should find that the _____ was not in a defective condition which
(product)
rendered it unreasonably dangerous.]

NOTE ON USE

Use this instruction, when appropriate, immediately following AMI 1008 or AMI 1013.

Use the bracketed clause in proposition "Second" when the court finds that the intended use of the product comes within the learned intermediary doctrine.

Do not use the final bracketed portion of this instruction if the case is submitted on interrogatories.

COMMENT

This instruction should be used when the trial court determines that reasonable minds could differ whether Comment k of the RESTATEMENT (SECOND) OF TORTS § 402A is applicable. The defense articulated in Comment k was adopted in *West v. Searle & Co.*, 305 Ark. 33, 806 S.W.2d 608 (1991), *appeal after remand*, 317 Ark. 525, 879 S.W.2d 412 (1994). This defense is applicable only where the product defect is predicated upon its design. It does not provide a defense against claims based on manufacturing defects or inadequate warnings. *Id.*

This instruction is appropriate only in cases involving a narrow range of products which are unavoidably unsafe. For further definition and examples of "unavoidably unsafe" products, see Annotation, "Products Liability: What is an 'Unavoidably Unsafe' Product," 70 A.L.R.4th 16 (1989).

The fourth element is based on *West, supra*, 305 Ark. at 40, 805 S.W.2d at 612-13. There the court stated that for Comment k "to protect

the designer of the product, the benefit of the product must outweigh the risk. This weighing process must consider the value of the benefit, the seriousness of the risk, and the likelihood of both." *See also* Toner v. Lederle Laboratories, 112 Idaho 328, 337, 732 P.2d 297, 305 (1987) (same, cited with approval in *West*).

The Arkansas Supreme Court in *West* rejected the approach of a small minority of jurisdictions that extend Comment k protection to all pharmaceuticals. 305 Ark. at 40–41, 806 S.W.2d at 612–13. A majority take a case-by-case approach. *See also* Freeman v. Hoffman-La Roche, Inc., 260 Neb. 552, 560–63, 618 N.W.2d 827, 836–38 (2000) (discussing different approaches and overruling precedent to adopt majority rule).

West v. Searle, supra, did not explicitly state whether the application of Comment k is a matter for the court or the jury. The court in Toner v. Lederle Laboratories, 112 Idaho 328, 339 n.9, 732 P.2d 297, 308 n.9 (1987) (citations omitted), a decision relied upon heavily for other points in *West*, notes that "[s]ome courts and commentators, emphasizing the factual determinations necessary, leave it to the jury Others, concerned with the policy implications of the decision, would have the court decide comment k's application as a matter of law." *See generally* Victor E. Schwartz, Unavoidably Unsafe Products: Clarifying the Meaning and Policy Behind Comment k, 42 Wash. & Lee L. Rev. 1139, 147–48 (1985) (arguing that, because the basic questions raised by Comment k are not "what occurred at a particular time or who did what to whom" but instead "are questions of law and policy," Comment k's application ought to be determined by courts rather than juries). A third approach seems to recognize that reasonable minds could not disagree that some products, such as the rabies vaccine, *Castrignanao v. E.R. Squibb & Sons, Inc.*, 546 A.2d 775, 781–82 (R.I. 1988) (noting division), or the Sabin oral polio vaccine, *Johnson v. American Cyanamid Co.*, 239 Kan. 279, 285–86, 718 P.2d 1318, 1323–24 (1986), merit Comment k protection and so the court will recognize it as a matter of law. *Castrignanao* went on to say, however, that if "a trial judge finds that an application of the risk-benefit analysis allows reasonable minds to differ in their conclusions, then the trial judge should submit the issue to the trier of fact." 546 A.2d at 782.

Research References

West's Key Number Digest
Products Liability ¶434, 437

Legal Encyclopedias

C.J.S., Motor Vehicles §§ 492 to 493; Products Liability §§ 280 to 291

AMI 1010

PRODUCTS LIABILITY—ISSUES—BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY— BURDEN OF PROOF

In this case _____ claims damages on the ground
 that _____
 (plaintiff)
 that _____ breached an implied warranty in that
 (defendant)
 _____ was not fit at the time _____ sold it for
 (defendant's) (product) (defendant)
 the ordinary purposes for which such goods are used
*[and was not adequately contained, packaged, and
 labeled] [and did not conform to any promises or af-
 firmations of fact made on the container or label].* In
 order to recover, _____ must prove each of five es-
 (plaintiff)
 sential propositions:

First, that *[he]/[she]* has sustained damages;

Second, that _____ sold a _____ which was not
 (defendant) (product)
 fit at the time _____ sold it for the ordinary purposes
 (defendant)
 for which such goods are used *[and was not ad-
 equately contained, packaged, and labeled] [and did
 not conform to any promises or affirmations of fact
 made on the container or label];*

Third, that such condition of the _____ was a
 (product)
 proximate cause of _____'s damages;
 (plaintiff)

Fourth, that _____ was a person whom _____
 (plaintiff) (defendant)
 might reasonably expect to *[use] [consume] [or] [be
 affected by]* the _____; and
 (product)

[Fifth, that _____ notified _____ within a reason-
 (plaintiff) (defendant)

able time after _____ discovered or should have
(plaintiff)
discovered the breach of this implied warranty.]

[If you find from the evidence in this case that each of these propositions has been proved, then your verdict should be for _____ (against the party or
(plaintiff)
parties you find to have breached this implied warranty); but if, on the other hand, you find from the evidence that any of these propositions has not been proved, then your verdict should be for _____ (on
(defendant)
the issue whether _____ breached this implied
(defendant)
warranty).]

NOTE ON USE

Do not use this instruction when the cause of action is based on breach of the implied warranties of habitability, sound workmanship, and proper construction in the sale of a house. *See* AMI 1205 to 1208.

If there is no issue of fact whether notice of the breach was given to the defendant, do not use the bracketed fifth element. If there is an issue concerning the adequacy of the notice, an additional instruction may be appropriate.

Do not use the final bracketed paragraph of this Instruction if the case is submitted on interrogatories.

COMMENT

This instruction is based on Ark. Code Ann. § 4-2-314 and Ark. Code Ann. § 4-2-607(3)(a).

Revision of this instruction deleted the legal term “merchantability” as unnecessary to the instruction’s substance and in the interest of providing the jury a “plain English” instruction.

This instruction has not continued the statutory element that the goods “must pass without objection in the trade,” Ark. Code Ann. § 4-2-314(2)(a), because it is not pertinent to products liability actions.

Ark. Code Ann. § 4-2-607(3)(a) requires a buyer to give the seller

notice of the breach within a reasonable time after the buyer discovers or should have discovered the breach. The court approved a notice instruction based on Ark. Code Ann. § 4-2-607(3)(a) in *Precision Steel Warehouse, Inc. v. Anderson-Martin Machine Co.*, 313 Ark. 258, 261, 856 S.W.2d 306, 307-08 (1993) (noting absence of such an element in AMI 1010 and 1011). Notice is a condition precedent to recovery which must be alleged and proved. *Williams v. Mozark Fire Extinguisher Co.*, 318 Ark. 792, 888 S.W.2d 303 (1994); *L. A. Green Seed Co. of Ark. v. Williams*, 246 Ark. 463, 469, 438 S.W.2d 717, 720 (1969); *Industrial Electronic Supply, Inc. v. Lytle Mfg., L.L.C.*, 94 Ark. App. 81, 226 S.W.3d 1 (2006); *Adams v. Wacaster Oil Co., Inc.*, 81 Ark. App. 150, 98 S.W.3d 832 (2003). Whether the notice was sufficient or timely is ordinarily a question of fact to be resolved by the factfinder. *Greenfield Seed Co. v. Bland*, 18 Ark. App. 48, 710 S.W.2d 833 (1986), citing *L. A. Green Seed Co. of Ark.*, *supra*, and its reference to Comment 4 to Ark. Code Ann. § 4-2-607; *Industrial Electronic Supply, Inc.*, *supra*. Where the evidence is such that it can lead reasonable minds to only one conclusion as to the sufficiency of notice, however, it becomes a question of law to be resolved by the court. *Cotner v. International Harvester Co.*, 260 Ark. 885, 889, 545 S.W.2d 627, 630 (1977).

The court has also observed in the commercial context that general notice of an alleged defect is not enough. Rather, the notice must be sufficient to put the seller on notice that the buyer is looking to it for damages for the alleged breach of warranty. *Cotner*, *supra*. The filing of a complaint itself does not constitute adequate notice. *Williams*, *supra*. The purpose in the commercial context of the notice requirement is to give the seller an opportunity “to minimize damages in some way, such as correcting the defect[, and] . . . to give immunity to a seller from stale claims.” *Cotner*, *supra*, 260 Ark. at 889, 545 S.W.2d at 630. Notice need not be in writing, *Smart Chevrolet Co. v. Davis*, 262 Ark. 500, 502, 558 S.W.2d 147, 148 (1977), but the court has observed that it must be “sufficient to let the seller know that the transaction is still troublesome and must be watched.” *Cotner*, *supra*, 260 Ark. at 880, 545 S.W.2d at 630 (citing U.C.C. Comment 4). These issues do not appear as an element in this Instruction for four reasons: First, the statute says only “reasonable time.” Second, none of these cases held that these issues must be addressed in jury instructions. Third, the Instruction that the court held was sufficient in *Precision Steel* said nothing about them. Fourth, Comment 4 to the Uniform Commercial Code recognizes that “‘(a) reasonable time’ for notification from a retail customer is to be judged by different standards [than those applicable to a merchant buyer] so that in his case it will be extended, for the rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith customer of his remedy.”

Research References

West's Key Number Digest
Sales ⇨2871

Legal Encyclopedias
C.J.S., Sales § 512

AMI 1011

PRODUCTS LIABILITY—ISSUES—BREACH OF IMPLIED WARRANTY OF FITNESS FOR PARTICULAR PURPOSE

 claims damages from **on the ground**
 (Plaintiff) **that the** **[was] [were] not fit for the particular**
 (product) **purpose for which [it was] [they were] intended.**

In order to recover **has the burden of proving seven essential propositions:**
 (plaintiff)

One, that [he][she] has sustained damages.

Second, that at the time of contracting **had reason to know the particular purpose for which**
 (defendant) **the** **[was] [were] required.**
 (product)

Third, that **had reason to know that the**
 (defendant) **buyer was relying on** **'s skill or judgment to**
 (defendant) **select or furnish a suitable** .
 (product)

Fourth, that the **[was] [were] not fit for the**
 (product) **particular purpose for which [it was] [they were] required.**

Fifth, that this unfitness of the **was a**
 (product) **proximate cause of** **'s damages;**
 (plaintiff)

Sixth, that _____ was a person whom _____
(plaintiff) (defendant)
would reasonably have expected to [use] [consume]
[or] [be affected by] the _____;
(product)

[Seventh, that _____ notified _____ within a rea-
sonable time after _____ discovered or should have
discovered that the _____ [was][were] not fit for the
particular purpose for which [it][they] [was][were]
required.]

[If you find from the evidence in this case that each of these propositions has been proved, then your verdict should be for _____ (against the party you find to have breached this duty); but if, on the other hand, you find from the evidence that any of these propositions has not been proved, then your verdict should be for _____].

NOTE ON USE

If there is no issue of fact whether notice of the breach was given to the defendant, do not use the bracketed seventh element. If there is an issue concerning the adequacy of the notice, an additional instruction may be appropriate.

Do not use the final bracketed paragraph of this Instruction if the case is submitted on interrogatories.

COMMENT

This instruction is based on Ark. Code Ann. § 4-2-315. *See also* E.I. DuPont de Nemours & Co. v. Dillaha, 280 Ark. 477, 659 S.W.2d 756 (Ark. 1983) (reciting elements).

For discussion of the notice issue, see the Comment to AMI 1010.

It is not necessary to prove that the supplier had actual knowledge of the particular purpose for which the product was intended. It is suf-

ficient that the supplier has reason to realize the particular purpose the buyer has in mind and permits the buyer to make the purchase on the assumption that the goods are suitable to his or her needs. *Berkeley Pump Co. v. Reed-Joseph Land Co.*, 279 Ark. 384, 653 S.W.2d 128 (1983).

There is a conflict between several Arkansas cases and the language of Ark. Code Ann. § 4-2-315 regarding the third element. The court in *E.I. DuPont de Nemours & Co. v. Dillaha*, *supra*, stated the third element as requiring that "the defendant *knew* the buyer was relying on the defendant's skill or judgment to select or furnish the product." 280 Ark. at 480, 659 S.W.2d at 757 (emphasis added). This formulation is repeated in other Arkansas cases, e.g., *Great Dane Trailer Sales, Inc. v. Malvern Pulpwood, Inc.*, 301 Ark. 436, 785 S.W.2d 13 (1990); *Woods v. Hopmann Machinery, Inc.*, 301 Ark. 134, 782 S.W.2d 363 (1990). The statute, however, says, in pertinent part, "*has reason to know* any particular purpose for which the goods are required and *that the buyer is relying on the seller's skill or judgment . . .*" (emphasis added). Similarly, the court in *Berkeley Pump Co. v. Reed-Joseph Land Co.* said that "it is enough that the seller has reason to realize the purpose intended or *that the reliance exists*." 653 S.W.2d at 133-34 (emphasis added). See also *Arkansas Carpenters' Health & Welfare Fund v. Philip Morris, Inc.*, 75 F. Supp.2d 936, 946 (E.D. Ark. 1999) (quoting statute). Because the precise distinction between "knew" and "had reason to know" was not at issue in *E.I. DuPont de Nemours*, *Great Dane Trailer Sales, Inc.*, or *Woods*, the Committee has opted to follow the language of the statute in the instruction.

Research References

West's Key Number Digest
Sales ◊2871

Legal Encyclopedias
C.J.S., Sales § 512

AMI 1012

PRODUCTS LIABILITY—ISSUES—BREACH OF EXPRESS WARRANTY

 [also] claims damages from **on the**
(Plaintiff) (defendant)
ground that **made and breached certain**
(defendant)
express warranties concerning the .
(product)

[Any affirmation of fact or promise made by the
 to the buyer which relates to the goods and
(defendant)
becomes part of the basis of the bargain creates an
express warranty that the goods shall conform to the
affirmation or promise.]

[Any description of the goods which is made part
of the basis of the bargain creates an express war-
ranty that the goods shall conform to the description.]

[Any sample or model which is made part of the
basis of the bargain creates an express warranty that
the goods shall conform to the sample or model.]

[It is not necessary to the creation of an express
warranty (that **use formal words such as “war-**
(defendant)
rant” or “guarantee”) (or) (that [he][she] have a
***specific intention to make a warranty.*) (On the other**
hand, an affirmation merely of the value of the goods
or a statement purporting to be merely **'s**
(defendant)
opinion or commendation of the goods does not cre-
ate a warranty.))]

In order to recover for breach of an express war-
ranty, **has the burden of proving each of six es-**
(plaintiff)
sential propositions:

First, that *[he][she]* has sustained damages.

Second, that an express warranty was created by *[one of]* the means I have just mentioned.

Third, that the _____ did not conform to the
(product)
express warranty created.

Fourth, that failure of the _____ to conform to the
(product)
express warranty was the proximate cause of _____'s
(plaintiff)
damages;

Fifth, that _____ was a person whom _____ might
(plaintiff) (defendant)
reasonably expect to *[use] [consume] [or] [be affected by]* the _____; and
(goods or product)

[Sixth, that _____ notified _____ of the breach
(plaintiff) (defendant)
within a reasonable time after *[he][she]* discovered or
should have discovered it.]

[If you find from the evidence in this case that each of these propositions has been proved, then your verdict should be for _____ (against the party or
(plaintiff)
parties which made and breached the express warranty); but if, on the other hand, you find from the evidence that any of the propositions has not been proved, then your verdict should be for _____].
(defendant(s))

NOTE ON USE

If there is no issue of fact whether notice of the breach was given to the defendant, do not use the bracketed sixth element. If there is an issue concerning the adequacy of the notice, an additional instruction may be appropriate.

Do not use the final bracketed paragraph if the case is submitted on interrogatories.

COMMENT

This instruction is based on Ark. Code Ann. § 4-2-313 and § 4-2-607(3)(a).

For discussion of the notice element, *see* the Comment to AMI 1010.

In *Ciba-Geigy Corp. v. Alter*, 309 Ark. 426, 447–48, 834 S.W.2d 136, 146–47 (1992), the court held that the statements in advertising materials did not become a basis of the parties' bargain because the buyer did not read them and therefore they did not constitute an express warranty, but in-person assurances made to the buyer regarding the product's safety could be found to be affirmations of fact and not mere opinion. An affirmation that an automobile was a one-owner vehicle, when it was actually two-thirds of one car and one-third of another car put together, was held to create an express warranty in *Currier v. Spencer*, 299 Ark. 182, 186, 772 S.W.2d 309, 311 (1989). For a case reversing the trial court's application of a stringent definition of "express warranty" as incompatible with the statute and caselaw, *see Little Rock School Dist., of Pulaski County v. Celotex*, 264 Ark. 757, 765–66, 574 S.W.2d 669, 673–74 (1978), *reh'g granted on other grounds*, 264 Ark. 757, 576 S.W.2d 709 (1979). The court in *Walcott & Steele, Inc. v. Carpenter*, 246 Ark. 95, 100, 436 S.W.2d 820, 823 (1969), held that germination certification tags on bags of seeds constituted an express warranty as a matter of law.

Research References

West's Key Number Digest
Sales ◉2870

Legal Encyclopedias
C.J.S., Sales § 512

AMI 1013

**PRODUCTS LIABILITY—ISSUES—CLAIMS
INVOLVING TWO OR MORE THEORIES OF
LIABILITY**

 asserts separate grounds for the
(Plaintiff) (number)
recovery of damages: First, that [a defective
(product)
was (*manufactured*) (*or*) (*assembled*) (*or*) (*sold*) (*or*)
(*leased*) (*or*) () (by)] [*and*] [*the*
(otherwise distributed) (defendant)
other] [*second*] that [there was negligence on the part
of ()] [*and*] [*third*] [that breached an
(defendant) (defendant(s))
implied warranty that was not fit at
(defendant's (s')) (product)
the time sold it for the ordinary purposes for
(defendant)
which such goods are used [*and was not adequately
contained, packaged, and labeled*] [*and did not
conform to any promises or affirmations of fact made
on the container or label*] [*and*] [*fourth*] [that an
implied warranty of fitness for a particular purpose
was breached (by (*defendant*))] [*and*] [*fifth*] [that an
express warranty was breached (by)]].
(defendant)

[With respect to the (*manufacture*) (*or*) (*assembly*)
(*or*) (*sale*) (*or*) (*lease*) (*or*) () of a defective
(other distribution)
product, (claims damages from and)
(plaintiff) (defendant)
has the burden of proving each of four essential
propositions:

First: That [*he*][*she*] has sustained damages;

Second: That (*was*) (*were*) engaged in the
(defendant)
business of (*manufacturing*) (*or*) (*assembling*) (*or*)
(*selling*) (*or*) (*leasing*) (*or*) () ;
(otherwise distributing) (product)

Third: That the _____ was supplied by _____ in a defective condition, which rendered it unreasonably dangerous; and
(product) (defendant)

Fourth: That the defective condition was a proximate cause of _____'s damages.]
(plaintiff)

[With respect to proof of a defective condition, if you find that in the normal course of events no (*injury*) (*death*) (*or*) (*property damage*) would have occurred in the absence of some defect, then you are permitted, but not required, to infer that a defect existed.]

[With respect to the claim of negligence, _____
(plaintiff)
has the burden of proving each of three essential propositions:

First: That [*he*]/[*she*] has sustained damages;

Second: That _____ was negligent; and
(defendant)

Third: That such negligence was a proximate cause of _____'s damages.]
(plaintiff)

[In order to recover for breach of an implied warranty that _____ was not fit at the time _____
(defendant's) (product) (defendant)
sold it for the ordinary purposes for which such goods are used [*and was not adequately contained, packaged, and labeled*] [and did not conform to any promises or affirmations of fact made on the container or label, _____ has the burden of proving each of five
(plaintiff)
essential propositions:

First: That [*he*]/[*she*] has sustained damages;

Second: That _____ sold a _____ which was not
(defendant) (product)
fit at the time _____ sold it for the ordinary purposes
(defendant)
for which such goods are used [and was not adequately contained, packaged, and labeled] [and did not conform to any promises or affirmations of fact made on the container or label];

Third: That this condition was a proximate cause of 's damages;
(plaintiff)

Fourth: That **was a person whom**
might reasonably expect to (use) (consume) (or) (be
affected by) the ; **and**
 (product)

[Fifth, that notified of the breach of
 (plaintiff) (defendant)
this implied warranty within a reasonable time after
[he]/[she] discovered or should have discovered it.].

[With respect to the asserted breach of a warranty of fitness for a particular purpose, (plaintiff) has the burden of proving seven essential propositions:

First: That [he][she] has sustained damages;

Second: That at the time of contracting _____ (defendant) had reason to know the particular purpose for which the _____ (product) (was) (were) required;

Third: That _____ knew that the buyer was relying on _____'s skill or judgment to select or furnish a suitable _____;

Fourth: That the _____ (product) (was) (were) not fit for the particular purpose for which (it was) (they were) required;

Fifth: That this unfitness of the _____ (product) was a proximate cause of _____'s damages; (plaintiff)

Sixth: That _____ (plaintiff) was a person whom (defendant) would reasonably have expected to (use) (consume) (or) (be affected by) the _____; and (product)

[Seventh, that _____ (plaintiff) notified _____ (defendant) within a reasonable time after [he][she] discovered or should have discovered that the _____ (product) [was][were] not fit for the particular purpose for which [it][they] [was][were] required.].]

[With respect to the asserted breach of an express warranty:

(Any affirmation of fact or promise made by _____ (defendant) to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.)

(Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to that description.)

(Any sample or model which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the sample or model.)

(It is not necessary to the creation of an express warranty [that _____ use formal words such as “warrant” or “guarantee”] [or] [that _____ have a specific intention to make a warranty.]) (On the other hand, an affirmation merely of the value of the goods or a statement purporting to be merely _____ opinion or commendation of the goods does not create a warranty.)

In order to recover for breach of an express warranty, _____ has the burden of proving each of six essential propositions:

First: That [he][she] has sustained damages;

Second: That an express warranty was created by (one of) the means I have just mentioned;

Third: That the _____ did not conform to the express warranty created;

Fourth: That failure of the _____ to conform to the express warranty was a proximate cause of _____’s damages; and

Fifth: That _____ was a person whom _____ might reasonably expect to (use) (consume) (or) (be affected by) the _____; and

[Sixth, that _____ notified _____ of the breach within a reasonable time after [he][she] discovered or should have discovered it.].]

[It will be necessary for you to consider separately

each asserted ground for recovery. If you find from the evidence that every essential proposition with respect to any one ground for recovery has been proved, then your verdict should be for _____ (and
(plaintiff)
against the party or parties against whom that ground for recovery is asserted); but if you find from the evidence that any essential proposition with respect to any one ground for recovery has not been proved, then your verdict with respect to that ground for recovery should be for (_____) (the party or parties
(defendant)
against whom that ground for recovery is asserted).]

NOTE ON USE

In the first paragraph the several causes of action should be listed as “one . . . and the other” or as “First, . . . second, . . . third,” etc.

If a cause of action asserting negligence is involved, AMI 302 and 303, defining negligence and ordinary care, should be given.

Do not use the final paragraph if the case is submitted on interrogatories.

This instruction can be used to submit to the jury any combination of five separate causes of action in the field of products liability: strict liability (AMI 1008); negligence (AMI 203); breach of implied warranty of merchantability (AMI 1010); breach of implied warranty of fitness for a particular purpose (AMI 1011); and breach of an express warranty (AMI 1012). Before using this instruction consult the Notes on Use and Comments with respect to those AMI instructions.

COMMENT

“Negligence and strict liability are not mutually exclusive claims. More than one theory of liability is permissible in a products liability action.” *Nationwide Rentals Co., Inc. v. Carter*, 298 Ark. 97, 100–01, 765 S.W.2d 931, 933 (1989). For other products liability cases involving instruction on multiple theories, see *W.M. Bashlin Co. v. Smith*, 277 Ark. 406, 643 S.W.2d 526 (1982) (upholding plaintiff’s verdict on interrogatories answered in the affirmative as to defendant’s unspecified negligence but in the negative as to strict products liability elements, citing AMI); *Berkeley Pump Co. v. Reed-Joseph Land Co.*, 279 Ark. 384, 653 S.W.2d 128 (1983) (holding it error to submit the strict liability claim to the jury but correct to submit claim for breach of implied war-

ranty of fitness); *Threlkeld v. Worsham*, 30 Ark. App. 251, 785 S.W.2d 249 (1990) (upholding verdict on case submitted to jury on multiple theories).

Research References

West's Key Number Digest

Products Liability ⑈420; Sales ⑈2873

Legal Encyclopedias

C.J.S., Motor Vehicles §§ 492 to 493; Products Liability §§ 280 to 291; Sales § 512

to claim a right to (product) AMI 1014

**PRODUCTS LIABILITY—ISSUES—COMPARATIVE
FAULT—EVIDENCE**

 contends and has the burden of proving
(Defendant)
that
(plaintiff)

[failed to use ordinary care to discover any defect
which may have been present in the] [or]
(product)

[continued to use the with the knowledge
(product)
of the defect] [or]

[misused the in a manner that was unfore-
(product)
seeable to] [or]
(defendant)

[(used the) (continued to use the) beyond
(product)
its anticipated life when [he][she] knew or should
have known the anticipated life of the] [or]
(product)

[made an alteration to the that was unfore-
(product)
seeable to] [or]
(defendant)

[made a change to the (product) that was unfore-
seeable to] [or]
(defendant)

[Improperly maintained the] [or]
(product)

[made abnormal use of the that was unfore-
(product)
seeable to (defendant)].

If _____ proves (*this contention*) (*one or more of*
(defendant)
these contentions), (*it*) (*they*) may be considered by
you as evidence of [*negligence*] [*fault*] on the part of
_____ along with all other facts and circumstances in
(plaintiff)
this case.

NOTE ON USE

Insert the appropriate affirmative defense(s) from the bracketed options.

Use this instruction with AMI 2101 or another appropriate instruction from Chapter 21.

COMMENT

This instruction is based on Ark. Code Ann. §§ 16-116-105 and 106.

This instruction is limited to defenses to claims for damages for personal injury, wrongful death, or injury to property. *Little Rock Elec. Contractors, Inc. v. Okonite Co.*, 294 Ark. 399, 744 S.W.2d 381 (1988).

See H. WOODS & B. DEERE, *COMPARATIVE FAULT* §§ 14:26, 14:27, 14:28, 14:34, 14:35, 14:37, 14:38, 14:39, 14:40 (3d ed. 1996).

Research References

West's Key Number Digest
Products Liability ¶435

Legal Encyclopedias
C.J.S., Motor Vehicles §§ 492 to 493; Products Liability §§ 280 to 291

AMI 1015

PRODUCTS LIABILITY—ISSUES—COMPLIANCE
WITH LAW

When the _____ was manufactured, [a] [federal]
(product)
[state] [statute(s)] [and] [regulation(s)] prescribed
standards of [design] [inspection] [testing] [manufac-
ture] [labeling] [warning] [and] [instructions for use]
of the _____, which provided:
(product)

[Quote or summarize applicable statute(s) or
regulation(s)].

_____ contends that the _____ complied with
(Defendant) (product)
[this][these] [statute(s)] [and] [regulation(s)] and has
the burden of proving this contention. If you find the
_____ complied with the [statute(s)] [and] [regula-
(product)
tion(s)], you shall consider this as evidence that the
product was not in an unreasonably dangerous condi-
tion in regard to matters covered by the [statute(s)]
[and] [regulation(s)].

NOTE ON USE

Use the brackets to insert the appropriate description of the
statute(s) or regulation(s) and the standards provided.

COMMENT

This instruction is based on Ark. Code Ann. § 16-116-105.

See Haynes v. AMC, 691 F.2d 1268 (8th Cir. 1982), and Buchanna
v. Diehl Mach., Inc., 98 F.3d 366 (8th Cir. 1996), for a discussion of the
evidentiary basis necessary to support the giving of this type of
instruction.

AMI 1016

DEFINITION AND INFERENCE—DEFECTIVE
CONDITION

In these instructions, I have used the phrase “defective condition.” Defective condition means the product is unsafe for reasonably foreseeable [use] [and/or] [consumption].

[With respect to proof of a defective condition, if you find that in the normal course of events no (injury) (death) (or) (property damage) would have occurred without some defect, then you are permitted, but not required, to infer that a defect existed.]

NOTE ON USE

Use this instruction with AMI 1008, 1009, and 1013.

Use the second bracketed paragraph when there is an absence of direct proof of a specific defect and plaintiff negates other possible causes of failure of the product, not attributable to the defendant, and thus raises a reasonable inference that the defendant is responsible for the defect.

COMMENT

This instruction is based on Ark. Code Ann. § 16-116-102(2).

For analysis of the requirement that the product be “defective,” see *Elk Corp. of Arkansas v. Jackson*, 291 Ark. 448, 725 S.W.2d 829 (1987).

It is “an essential constituent of proof” required under the statute that “the product was in a defective condition at the time it left the hands of the particular seller.” *Yielding v. Chrysler Motor Co.*, 301 Ark. 271, 274–75, 783 S.W.2d 353, 355–56 (1990). See *Campbell Soup Co. v. Gates*, 319 Ark. 54, 889 S.W.2d 750 (1994) (same).

Although proof of a specific defect is normally required, this is not true when “common sense tells us that the accident would not have occurred in the absence of a defect.” *Harrell Motors, Inc. v. Flanery*, 272 Ark. 105, 612 S.W.2d 727 (1981). See also *Yielding, supra*, 301 Ark. at 274–76, 783 S.W.2d 355–57 (recognizing doctrine but affirming grant of

summary judgment on other grounds); *Williams v. Smart Chevrolet Co.*, 292 Ark. 376, 730 S.W.2d 479 (1987) (applying doctrine and finding its predicates not met); *Higgins v. General Motors Corp.*, 287 Ark. 390, 699 S.W.2d 741 (1985) (same); *Southern Co. v. Graham*, 271 Ark. 223, 607 S.W.2d 677 (1980) (upholding application of doctrine). For the case to proceed to the jury on such a theory, the plaintiff must produce evidence that tends to negate other causes of the observed product failure. *Williams, supra*, 292 Ark. at 382-84, 730 S.W.2d at 482-83; *Higgins, supra*, 287 Ark. at 392, 699 S.W.2d at 743; *Campbell Soup Co., supra* 319 Ark. at 60-62, 889 S.W.2d at 753-54 (presence of beetle larvae in noodle packets more than a month after manufacture and shipment held not sufficient to negate other causes). *See also* *Kaplon v. Howmedica, Inc.*, 83 F.3d 263, 266-67 (8th Cir. 1996) (concluding that evidence was insufficient to negate other causes for failure of orthopedic device). For a case noting that the plaintiff is not required to negate other causes when there is proof of a defect, *see* *Nationwide Rentals Co., Inc. v. Carter*, 298 Ark. 97, 104, 765 S.W.2d 931, 935 (1989).

AMI 1017

DEFINITION—UNREASONABLY DANGEROUS

In these instructions, I have used the phrase “unreasonably dangerous.” Unreasonably dangerous means that a _____ is dangerous to an extent beyond (product) that which would be contemplated by the ordinary and reasonable buyer, consumer, or user who acquires or uses the _____, assuming the ordinary (product) knowledge of the community or of similar buyers, users, or consumers as to its characteristics, propensities, risks, dangers, and proper and improper uses, as well as any special knowledge, training, or experience possessed by the particular buyer, user, or consumer or which [he]/[she] was required to possess.

[As to a minor, unreasonably dangerous means that a (product) is dangerous to an extent beyond that which would be contemplated by an ordinary and reasonably careful minor considering [his]/[her] age and intelligence.]

NOTE ON USE

Use this instruction with AMI 1008, 1009, and 1013.

Use the bracketed paragraph when plaintiff is a minor.

COMMENT

This instruction is based on Ark. Code Ann. § 16-116-102(7).

See *Berkeley Pump Co. v. Reed-Joseph Land Co.*, 279 Ark. 384, 653 S.W.2d 128 (1983) (citing AMI 1008), for a discussion of the “unreasonably dangerous” requirement. See *Kaplon v. Howmedica, Inc.*, 83 F.3d 263 (8th Cir. 1996), for a discussion of evidence of special knowledge as it relates to this requirement.

In *Harris v. Pacific Floor Mach. Mfg. Co.*, 856 F.2d 64 (8th Cir. 1988), the court held that it was prejudicial error for the trial court to

refuse the requested instruction defining “unreasonably dangerous” as to a minor. Because only minors regularly operated the product, the court did not reach the question whether the standard with respect to a minor performing a dangerous activity usually engaged in only by adults should be the same in products liability as it is in negligence cases. That standard is discussed in the Comment to AMI 304.

An Arkansas statute provides that firearm and ammunition manufacturers shall not be liable in product liability actions on the grounds that such items have the inherent capability to cause damage. Ark. Code Ann. § 16-116-201. However, this statute does allow suit in tort against such manufacturers for damages proximately caused by acts in violation of a state or federal law or regulation or proximately caused by a defective product.

CHAPTER 11

OWNERS AND OCCUPIERS OF LAND

Table of Instructions

AMI

- 1101. Willful or Wanton Conduct—Definition.
- 1102. Duty Owed to Trespasser.
- 1103. Duty Owed to Licensee.
- 1104. Duty Owed to Invitee.
- 1105. Landlord's Duty of Care to Repair and Maintain Property.
- 1106. Duty Owed to Admitted Invitee—Foreign Object or Substance.
- 1107. Distinction Between a Trespasser or Licensee and an Invitee—Duty Owed to Each.
- 1108. Absolute Liability—Ultrahazardous Activities.
- 1109. Issues—Attractive Nuisance—Burden of Proof.
- 1110. Duty Owed by Owner or Occupier of Land—Injuries or Damages Off Premises.

AMI 1101

WILLFUL OR WANTON CONDUCT—DEFINITION

When I use the expression “willful or wanton conduct” I mean a course of action which shows an actual or deliberate intention to harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others.

NOTE ON USE

This instruction should precede AMI 1102, 1103, and 1107.

This instruction should be used when the term “willful or wanton conduct” is used in another instruction.

COMMENT

In *Lively v. Libbey Memorial Physical Medicine Center, Inc.*, 311 Ark. 41, 841 S.W.2d 609 (1992), this instruction and *Daniel Constr. Co. v. Holden*, 266 Ark. 43, 585 S.W.2d 6 (1979), are cited as the basis for the rule of law embodied in the instruction.

Research References

West's Key Number Digest
Negligence \Rightarrow 1733
Legal Encyclopedias
C.J.S., Negligence §§ 995, 1004 to 1005, 1007, 1010, 1020 to 1021

AMI 1102

DUTY OWED TO TRESPASSER

In this case _____ was a trespasser upon the premises of _____.

An [owner] [occupant] of property owes a trespasser no duty until [his][her] presence on the premises is known. Then the [owner] [occupant] owes the trespasser only a duty not to cause [him][her] injury by willful or wanton conduct.

NOTE ON USE

Use this instruction when there is no dispute that the injured person was a trespasser. If the status is in dispute, use AMI 1107.

The nature of the injured person's activities may require modification of this instruction. See Ark. Code Ann. § 18-11-301 (recreational users) and Ark. Code Ann. § 18-60-107 (persons involved in the acquisition or purchase of agricultural products).

COMMENT

This instruction states the rule in Ark. Code Ann. § 18-60-108 and is consistent with the holdings in *Southwestern Bell Tel. Co. v. Davis*, 247 Ark. 381, 445 S.W.2d 505 (1969); *Cato v. St. Louis Southwestern Ry. Co.*, 190 Ark. 231, 79 S.W.2d 62 (1935); and *Arkansas Short Line v. Bellars*, 176 Ark. 53, 2 S.W.2d 683 (1928).

The duty toward a trespasser in a position of peril arises when the perilous position is discovered, not when it should have been discovered. *Arkansas & L. Ry. Co. v. Sain*, 90 Ark. 278, 119 S.W. 659 (1909).

The fact that an alleged trespasser is a minor is not determinative of whether he or she is a trespasser. *Farm Bureau Mut. Ins. Co. of Arkansas, Inc. v. Henley*, 275 Ark. 122, 628 S.W.2d 301 (1982) (six-year old child may be a trespasser).

In *Coleman v. United Fence Co.*, 282 Ark. 344, 668 S.W.2d 536 (1984), the court held that the parking of a vehicle without permission on a landowner's property was a continuing trespass, and the landowner was not liable for injuries to the plaintiff when he returned to remove the vehicle at the request of a company contracted by the landowner to construct a fence.

Research References

West's Key Number Digest
Negligence Ⓐ1733

Legal Encyclopedias
C.J.S., Negligence §§ 995, 1004 to 1005, 1007, 1010, 1020 to 1021

AMI 1103

DUTY OWED TO LICENSEE

In this case, _____ was a licensee upon the premises of _____.

An [owner] [occupant] of property owes a licensee no duty until [his][her] presence on the premises is known or reasonably should be known. Then, the [owner] [occupant] owes the licensee only a duty not to cause [him][her] injury by willful or wanton conduct. [If, however, the (owner) (occupant) knows that a licensee is in a position of danger, [he][she] is under a duty to use ordinary care to avoid injury to the licensee.] [If, however, the (owner) (occupant) knows or has reason to know of a condition on the premises which is not open and obvious and which creates an unreasonable risk of harm to licensees, [he][she] is under a duty to use ordinary care to make the condition safe or to warn those licensees who do not know or have reason to know of the danger.]

NOTE ON USE

Use this instruction when there is no dispute that the injured person was a licensee. If the status is in dispute use AMI 1107.

For cases involving a landlord's agreed or assumed duty, use AMI 1105.

The nature of the injured person's activities may require modification of this instruction. See Ark. Code Ann. § 18-11-301 (recreational users) and Ark. Code Ann. § 18-60-107 (persons involved in the acquisition or purchase of agricultural products).

COMMENT

This instruction was cited with approval in *Tucker v. Sullivan*, 307 Ark. 440, 445, 821 S.W.2d 470, 472 (1991), and it states the rules of law discussed in *Lively v. Libbey Memorial Physical Medicine Center, Inc.*, 311 Ark. 41, 47, 841 S.W.2d 609, 612 (1992) and *Webb v. Pearson*, 244 Ark. 109, 111, 424 S.W.2d 145, 146 (1968).

The last bracketed sentence of the instruction is based upon the concept contained in the RESTATEMENT (SECOND) OF TORTS § 342 (1965) that an owner or occupant who knows or has reason to know of a condition on the premises that is not open and obvious and creates an unreasonable risk of harm to licensees has a duty to use ordinary care to make the condition safe, or to warn those licensees who do not know or have reason to know of the danger. The court by obiter dictum in *Dorton v. Francisco*, approved this rule. 309 Ark. 472, 478, 833 S.W.2d 362, 365 (1992). This duty to warn of hidden dangers or risks is also noted in *Young v. Paxton*, 316 Ark. 655, 660-61, 873 S.W.2d 546, 549 (1994), and *Lively*, 311 Ark. at 47, 841 S.W.2d at 612. The Committee believes these decisions reflect a modification of the harsher rule placing licensees in the same category with trespassers. See W. Page Keeton, *Prosser & Keeton on Torts* 415 (5th ed., 1984).

Ordinarily the only duty owed to a licensee is not to willfully or wantonly injure him after his presence is known, *Webb*, 244 Ark. at 111, 424 S.W.2d at 146; *Cato v. St. Louis Southwestern Ry. Co.*, 190 Ark. 231, 233, 79 S.W.2d 62, 63 (1935), or should be known. Keeton, *jan*, § 60. But there is a duty to exercise ordinary care toward a licensee in a position of peril, *Arkansas Short Line v. Bellars*, 176 Ark. 53, 62-63, 2 S.W.2d 683, 686 (1928), after his presence in such perilous position is known or if, by the exercise of reasonable care, it could have been discovered in time to avoid the injury. *Mo. Pac. R.R. Co. v. Thomas*, 197 Ark. 565, 569-70, 124 S.W.2d 820, 821 (1939).

A question might be raised whether a landowner could willfully or wantonly injure a person whose presence was not actually known to the landowner, though it should have been known. In *St. Louis-S. F. Railway Co. v. Bley*, the court indicated that in such a situation there could be no willful injury. 168 Ark. 814, 816, 271 S.W. 455, 455-56 (1925). The contrary view, however, was expressed in *Missouri Pacific Railroad*, 197 Ark. at 569-70, 124 S.W.2d at 821. The Committee regards the latter as the better view. If, for example, a landowner knew that licensees were often to be found at a certain place upon his land, he might be liable for willful or wanton conduct if he engaged in a highly dangerous activity, such as blasting, without first ascertaining that no licensees were actually present. In *Daniel Construction Co. v. Holden*, the Arkansas Supreme Court noted this comment and stated, "The committee regarded this as the better view, and we do, too." 266 Ark. 43, 49, 585 S.W.2d 6, 9-10 (1979).

In *Tucker*, a live-in companion was held to be a licensee notwithstanding substantial contributions to household expenses because her presence was primarily social. 307 Ark. at 442-43, 821 S.W.2d at 471.

In *Bader v. Lawson*, the court held that the licensee standard was applicable to a child social guest, declining to confer invitee status based upon the argument that entertaining and looking after another's

children was an economic benefit when the children's presence was primarily social. 320 Ark. 561, 564-65, 898 S.W.2d 40, 42-43 (1995). However, *Bader* was distinguished in *Anderson v. Mitts*, and the court held that the standard of ordinary care was applicable because the property owner had accepted responsibility for supervising the child. 87 Ark. App. 19, 25, 185 S.W.3d 154, 158 (2004).

In *King v. Jackson*, the court held that the danger presented by shoes left on a front porch is not a hidden danger that would create a duty to warn. 302 Ark. 540, 542, 790 S.W.2d 904, 905 (1990).

In *Baldwin v. Mosley*, the court held that there could be no willful or wanton injury or duty to warn a child under the supervision and control of his mother when the property owner was not present at the time of the injury. 295 Ark. 285, 288, 748 S.W.2d 146, 147-48 (1988).

In *Delt v. Bowers*, the court held that a picketing union member was, at most, a licensee, under the undisputed facts of the case. Therefore, the court did not address the question whether precautions for picketing safety were reasonable in relation to the foreseeable harm. 97 Ark. App. 323, 327, 249 S.W.3d 162, 166 (2007).

An owner owes no duty of care to keep premises safe for entry or use by others for recreational purposes or to give any warning of a dangerous condition, use, structure, or activity on the premises to persons entering for recreational purposes without charge (admission fee) unless the owner maliciously (but not merely negligently) fails to guard or warn against an ultra-hazardous condition or activity actually known to the owner to be dangerous. Ark. Code Ann. §§ 18-11-301 et seq.

Research References

West's Key Number Digest
Negligence ☞ 1733

Legal Encyclopedias
C.J.S., Negligence §§ 995, 1004 to 1005, 1007, 1010, 1020 to 1021

AMI 1104

DUTY OWED TO INVITEE

In this case, _____ was an invitee upon the premises of _____.

_____ owed _____ a duty to use ordinary care to maintain the premises in a reasonably safe condition. [No such duty exists, however, if the (*activity upon*) (*or*) (*condition of*) the premises that creates the danger was known by or obvious to _____ (unless _____ should reasonably anticipate that _____ would be exposed to the danger despite [*his*] [*her*] knowledge of it, or its obvious nature).]

NOTE ON USE

Use this instruction when there is no dispute that the injured person was an invitee. If the status is in dispute, use AMI 1107.

For cases involving a landlord's agreed or assumed duty, use AMI 1105.

In a case involving a foreign object or substance, use AMI 1106.

Use the bracketed sentence where there is substantial evidence that there was knowledge on the part of the invitee of the condition that creates risk of injury, or where there is substantial evidence that such condition was open and obvious. For instances where the last parenthetical phrase of the bracketed sentence is appropriate, see cases cited in the Comment.

The nature of the injured person's activities may require modification of this instruction. See Ark. Code Ann. § 18-11-301 (recreational users), and Ark. Code Ann. § 18-60-107 (persons involved in the acquisition or purchase of agricultural products).

COMMENT

This instruction is based on the holding in *Davis v. Safeway Stores*, 195 Ark. 23, 110 S.W.2d 695 (1937).

The bracketed sentence of the instruction states the "obvious danger rule," e.g., *Jenkins v. International Paper Co.*, 318 Ark. 663, 887 S.W.2d

300 (1994), as well as its recognized exceptions, *Carton v. Missouri Pac. R. Co.*, 303 Ark. 568, 798 S.W.2d 674 (1990); *Kuykendall v. Newgent*, 255 Ark. 945, 504 S.W.2d 344 (1974).

A possessor of land owes a duty to a business invitee to use ordinary care to protect him, not only from dangers of which the possessor knows, but also against those which, with reasonable care, he might discover. *DeVazier v. Whit Davis Lumber Co.*, 257 Ark. 371, 516 S.W.2d 610 (1974).

The liability of the owner or operator of a business to an invitee is not necessarily confined to his property boundary lines. *Ollar v. Spakes*, 269 Ark. 488, 601 S.W.2d 868 (1980). *See also* AMI 1110. However, before extraterritorial liability attaches, it must be shown that the owner or operator had actual or constructive knowledge of the danger to his invitees. When an owner or operator learns or should have learned of a dangerous condition existing adjacent to his property and fails to attempt to correct the condition or to warn the invitees of such danger, he may be found negligent. *Ollar, supra*.

The proprietor of a tavern or bar is under a duty to use reasonable care to protect patrons from reasonably foreseeable injury at the hands of other patrons. *Industrial Park Businessmen's Club, Inc. v. Buck*, 252 Ark. 513, 479 S.W.2d 842 (1972).

A contractor who, on behalf of a possessor of land, erects a structure or creates a condition on the land is subject to the same liability and has the same defenses as the possessor while the work is in charge of the contractor. *DeVazier, supra*. However, liability for harm does not continue after control of the condition by the contractor has been terminated. *DeVazier*, 257 Ark. at 375, 316 S.W.2d at 613.

In *Baxter v. Grobmyer Bros. Const. Co.*, 275 Ark. 400, 631 S.W.2d 265 (1982), the court discussed *DeVazier, supra*, and held it was not error to refuse to give AMI 1204 with AMI 1104 under the circumstances of that case.

A tenant is not an invitee on a landlord's premises, since the tenant has a right equal to that of the landlord to exclusive possession of the property. *Glasgow v. Century Property Fund XIX*, 299 Ark. 221, 772 S.W.2d 312 (1989).

In *Tucker v. Sullivan*, 307 Ark. 440, 821 S.W.2d 470 (1991), the court held that an invitee is either a business visitor or a public invitee, citing RESTATEMENT (SECOND) OF TORTS § 332 (1965). The court distinguished between public invitees and business invitees in *Lively v. Libbey Memorial Physical Medicine Center, Inc.*, 311 Ark. 41, 841 S.W.2d 609 (1992).

The duty owed to a business visitor and a public invitee is the same. *Young v. Paxton*, 316 Ark. 655, 873 S.W.2d 546 (1994).

The duty owed by an owner or occupier is usually satisfied where the condition creating the danger is either known by the invitee or is open and obvious to the invitee. *Young, supra*; *Jenkins v. International Paper Co.*, 318 Ark. 663, 887 S.W.2d 300 (1994) (affirming summary judgment where the evidence was that the invitee was aware of the substance he slipped and fell on and that the premises owner was not aware of the condition); but see *Dollar Gen. Corp. v. Elder*, 2020 Ark. 208 (2020) (affirming a jury verdict in favor of invitee who slipped and fell on wet concrete whereby there was substantial evidence that the condition was unreasonably dangerous and that the texture of the concrete prevented the invitee from determining the danger). However, under some circumstances an owner or occupier may owe a duty to an invitee despite the knowledge of the invitee. *Carton, supra* (invitee forced, as a practical matter, to encounter a known or obvious risk in order to perform his job); *Kuykendall, supra* (landowner should have anticipated that the dangerous condition would cause physical harm to one required to use the entrance way notwithstanding the known or obvious danger).

Other exceptions to the obvious danger rule are discussed in the authorities cited in *Jenkins, supra*; and *Kuykendall, supra*.

As to a social guest, see Comment to AMI 1107.

Boren v. Worthen Nat'l. Bank of Arkansas, 324 Ark. 416, 921 S.W.2d 934 (1996), presents the issue of a bank's liability for criminal acts of third persons for injuries to the bank's customers while using an ATM machine. The court adopted the "prior similar incidents test" for determining the issue of foreseeability.

A security company owes no duty to persons not on the premises that the company was guarding. *Tackett v. Merchant's Security Patrol*, 73 Ark. App. 358, 44 S.W.3d 349 (2001).

An owner owes no duty of care to keep premises safe for entry or use by others for recreational purposes or to give any warning of a dangerous condition, use, structure or activity on the premises to persons entering for recreational purposes without charge (admission fee) unless the owner maliciously (but not merely negligently) fails to guard or warn against an ultra-hazardous condition or activity actually known to the owner to be dangerous. Ark. Code Ann. §§ 18-11-301 et seq.

Research References

West's Key Number Digest
Negligence — 1733

Legal Encyclopedias
C.J.S., Negligence §§ 995, 1004 to 1005, 1007, 1010, 1020 to 1021

AMI 1105

LANDLORD'S DUTY OF CARE TO REPAIR AND
MAINTAIN PROPERTY

In this case _____ was upon premises owned by
(plaintiff)
_____ and leased to _____. _____ claims damages
(landlord) (tenant) (Plaintiff)
from _____ and has the burden of proving each of
(landlord)
_____ essential propositions:

First, that *[he][she]* sustained damages;

Second, [that _____ agreed to *(maintain) (or) (re-*
(landlord)
pair) the leased property and received consideration
for that agreement;] *[or]* that _____, *[by conduct, as-*
(landlord)
sumed the duty to (maintain) (or) (repair) the leased
property;]

Third, that _____ failed to perform the *[agreement]*
(landlord)
[or] [assumed duty] in a reasonable manner; and

[Fourth, that _____'s failure to perform the *[agree-*
(landlord)
ment] [or] [assumed duty] in a reasonable manner
was the proximate cause of _____'s damages.]
(plaintiff)

[If you find from the evidence in this case that
each of these propositions has been proved, then
your verdict should be for _____; but if, on the other
(plaintiff)
hand, you find from the evidence that any of these
propositions has not been proved, then your verdict
should be for _____.]
(landlord)

NOTE ON USE

Use this instruction when a claim arising from disrepair is asserted against a landlord or condominium association who either agreed to keep the property in repair or by conduct assumed that duty.

If an agreement is disputed, additional appropriately modified instructions from AMI 2402, AMI 2404 and AMI 2406 may be necessary.

Do not use the final bracketed paragraph when affirmative defenses such as negligence of the claimant are in issue. *See* AMI 206.

Do not use the final bracketed paragraph when the case is submitted on interrogatories.

COMMENT

This instruction was cited as authority for the rule it addresses in *Handy Dan Home Imp. Center, Inc.-Arkansas v. Peters*, 286 Ark. 102, 689 S.W.2d 551 (1985).

Only an express agreement or assumption of duty by conduct can remove a landlord from the general rule of nonliability. *Propst v. McNeill*, 326 Ark. 623, 932 S.W.2d 766 (1996).

In *Lloyd v. Pier W. Prop. Owners Ass'n*, 2015 Ark. App. 487, 470 S.W.3d 293 (2015), the Court of Appeals held a condominium association to the landlord standard of care as to common areas under its control.

A gratuitous promise to repair, unsupported by consideration, is not sufficient to create a duty on the part of the landlord. *Stalter v. Akers*, 303 Ark. 603, 798 S.W.2d 428 (1990).

A third party must establish a contractual duty of the landlord to repair a defect before he or she may recover for an injury suffered on leased property over which the landlord has relinquished possession and control to a tenant. *Stalter*, 303 Ark. at 607, 798 S.W.2d at 430.

A landlord has no duty to remove common hazards such as ice and snow from parts of the premises in common use by tenants. *Glasgow v. Century Property Fund XIX*, 299 Ark. 221, 772 S.W.2d 312 (1989).

A landlord does not owe a duty to protect a tenant, a tenant's employee, or a tenant's social guest from injury or criminal acts on the premises absent a statute, agreement, or assumption of duty by conduct. *Lacy v. Flake & Kelley Mgmt.*, 366 Ark. 365, 370-371, 235 S.W.3d 894, 898 (2006) (lease provision requiring commercial landlord to monitor building entryway did not give rise to duty to protect tenant's employee from criminal attack in parking lot; therefore, general rule of nonli-

ability applied); *Bussey v. Bearden*, 2011 Ark. App. 353, 384 S.W.3d 41 (affirming summary judgment for landlord on negligence claims brought by social guest of residential tenant who was severely beaten by a burglar in the apartment and rejecting argument that lease language modified the no-duty rule).

After certain suggestions in *Thomas v. Stewart*, 347 Ark. 33, 60 S.W.3d 415 (2001), that in the absence of legislative action, the court might reconsider the common law rule of landlords' nonliability, the Legislature, by Act 928 of 2005, stated that it re-adopted and codified the common law rule. However, the Act used language that varied slightly from some of the cases, e.g., "failure to perform the agreement or assumed duty in a reasonable manner" versus maintain the premises "in a reasonably safe condition." This instruction uses the statutory language.

Research References

West's Key Number Digest
Landlord and Tenant ⇨1363(1) to (4)

Legal Encyclopedias
C.J.S., Landlord and Tenant §§ 1037 to 1038

NOTE ON USE

Use “the” banana peel, “the” unidentified object, etc., when the fact of its presence is admitted; otherwise use “a” banana peel, “an” unidentified object, etc.

COMMENT

This instruction is based on the rule as recited in numerous Arkansas cases, including, for example, *Walmart Stores, Inc. v. Regions Bank Trust Dept.*, 347 Ark. 826, 832, 69 S.W.3d 20, 23–24 (2002) (collecting cases).

The previous version of this instruction is cited with approval in *Boykin v. Mr. Tidy Car Wash, Inc.*, 294 Ark. 182, 184, 741 S.W.2d 270, 271 (1987), and in *Willis v. Crestpark of Wynne, Inc. (Intermediate)*, 279 Ark. 456, 457, 652 S.W.2d 625, 625 (1983). Changes to the 2013 Edition are both to conform the instruction to the rule as stated in the cases and for the sake of clarity.

The previous version of this instruction was cited as authority for the elements of proof in *Conagra, Inc. v. Strother*, 340 Ark. 672, 677, 13 S.W.3d 150, 153 (2000), and in *Cowan v. Ellison Enterprises, Inc.*, 93 Ark. App. 135, 143, 217 S.W.3d 175, 180 (2005). The rules of law are stated in *House v. Wal-Mart Stores, Inc.*, 316 Ark. 221, 223, 872 S.W.2d 52, 53 (1994), and *Brunt v. Food 4 Less, Inc.*, 318 Ark. 427, 430, 885 S.W.2d 894, 896 (1994) (summary judgment affirmed where plaintiff made no contention that substance had been on floor for such a length of time that defendant should have known of its presence).

It is not necessary that the foreign object be specifically identified. *Akridge v. Park Bowling Ctr., Inc.*, 240 Ark. 538, 539–40 401 S.W.2d 204, 205 (1966) (plaintiff can make a prima facie showing without proving the nature of the foreign object that caused the slip and fall).

Res ipsa loquitur is not applicable to slip and fall cases. *Safeway Stores, Inc. v. Willmon*, 289 Ark. 14, 15, 708 S.W.2d 623, 624 (1986); *Miller v. F. W. Woolworth Co.*, 238 Ark. 709, 712, 384 S.W.2d 947, 949 (1964) (court affirmed defendant’s verdict stating that negligence is never presumed, but must be proved by the party alleging it).

“Without some proof (1) that the presence of the [foreign] substance on the premises was the result of [the defendant’s] negligence, or (2) that [the defendant] knew or should have known of its presence due to the length of time it was there, there is no basis for slip and fall liability.” *Jenkins v. Int’l Paper Co.*, 318 Ark. 663, 672, 887 S.W.2d 300, 304 (1994).

Absent actual knowledge of the presence of the foreign substance on the part of the owner or occupier of the premises, the burden is on

the plaintiff to establish the substantial interval between the time the substance appeared on the floor and the time of the injury. *House*, 316 Ark. at 224, 872 S.W.2d at 53; *Wal-Mart Stores, Inc.*, 347 Ark. at 832, 69 S.W.3d at 24 (plaintiff must prove that defendant was negligent by allowing the substance to remain on the floor for a substantial length of time).

Research References

West's Key Number Digest
Negligence Ⓒ1735

Legal Encyclopedias
C.J.S., Negligence §§ 995, 1005, 1020 to 1021

AMI 1107

**DISTINCTION BETWEEN A TRESPASSER OR
LICENSEE AND AN INVITEE—DUTY OWED TO
EACH**

One question in this case is whether _____ was a *[trespasser]* *[licensee]* or an invitee. The reason it is necessary for you to distinguish between the two is that an *[owner]* *[occupant]* of property owes a different duty to an invitee from that which *[he]**[she]* owes to a *[trespasser]* *[licensee]*.

[A trespasser is a person who goes upon the premises of another without permission and without an invitation, express or implied.]

[A licensee is a person who goes upon the premises of another with the consent of the *(owner)* *(occupant)* for *[his]**[her]* own purposes] [and not for the mutual benefit of *[himself]**[herself]* and the *(owner)* *(occupant)*] [and not for a purpose connected with the business which the *(owner)* *(occupant)* *(conducts)* *(permits to be carried on)*]. [The *(owner's)* *(occupant's)* consent to the licensee's presence upon the premises may be express or may be implied from the circumstances under which the licensee enters the premises.]

An invitee is a person who goes upon the premises of another *[for a purpose connected with the *(owner's)* *(occupant's)* business]* *[for a purpose connected with an activity which the *(owner)* *(occupant)* *(carries on)* *(permits to be carried on)* on the premises]* *[for a purpose mutually beneficial to *[himself]**[herself]* and the *(owner)* *(occupant)*]* [and] *[by the invitation of the *(owner)* *(occupant)*]*. [The invitation may be express or may be implied from the circumstances under which the person enters the premises.]

(A) An [owner] [occupant] of property owes to a trespasser only a duty not to cause [him][her] injury by gross negligence or willful or wanton conduct.

(B) An [owner] [occupant] of property owes a licensee no duty until [his][her] presence on the premises is known or reasonably should be known. Then the [owner] [occupant] owes the licensee only a duty not to cause [him][her] injury by willful or wanton conduct. [If, however, the (owner) (occupant) knows that a licensee is in a position of danger, [he][she] is under a duty to use ordinary care to avoid injury to the licensee.] [If, however, the (owner) (occupant) knows or has reason to know of a condition on the premises which is not open and obvious and which creates an unreasonable risk of harm to licensees, [he][she] is under a duty to use ordinary care to make the condition safe or to warn those licensees who do not know or have reason to know of the danger.]

(C) The [owner] [occupant] of property [has a duty to use ordinary care to maintain the premises in a reasonably safe condition for an invitee] [owes an invitee a duty to use ordinary care for [his][her] safety]. [No such duty exists, however, if the (activity upon) (or) (condition of) the premises which creates the danger was known by or obvious to an invitee (unless the (owner) (occupant) should reasonably anticipate that the invitee would be exposed to the danger despite [his][her] knowledge of it or its obvious nature).]

NOTE ON USE

This instruction is to be used when the injured person's status upon the premises is in dispute.

Use the first bracketed clause in paragraph (C) when the injury was caused by the condition of the premises. Use the second bracketed

clause when the injury was caused by the possessor's activities and was causally related to a condition on the premises.

For cases involving a landlord's agreed or assumed duty, use AMI 1105.

The nature of the injured person's activities may require modification of this instruction. *See* Ark. Code Ann. § 18-11-301 (recreational users) and Ark. Code Ann. § 18-60-107 (persons involved in the acquisition or purchase of agricultural products).

COMMENT

Much of the substantive law supporting this instruction is set forth in the Comments to AMI 1102, 1103, and 1104.

When an invitee goes beyond the boundaries of the invitation, he ceases to be an invitee and becomes a licensee or trespasser. *Daniel Constr. Co. v. Holden*, 266 Ark. 43, 585 S.W.2d 6 (1979); *Husted v. Richards*, 245 Ark. 987, 436 S.W.2d 103 (1969).

An owner or occupant of land is under a duty to exercise ordinary care to keep the premises reasonably safe for an invitee. *Davis v. Safeway Stores*, 195 Ark. 23, 110 S.W.2d 695 (1937). A licensee or trespasser takes the premises as he finds them. *Webb v. Pearson*, 244 Ark. 109, 424 S.W.2d 145 (1968); *Knight v. Farmers' & Merchants' Gin Co.*, 159 Ark. 423, 252 S.W. 30 (1923) (although invited to the premises, plaintiff remained a licensee because his purpose was for his sole benefit as a shareholder of the owner of the premises).

A landowner owes a duty to a trespasser or licensee to refrain from wantonly or willfully causing injury. *Guthrie v. Tyson Foods, Inc.*, 285 Ark. 95, 685 S.W.2d 164 (1985).

It is error to give paragraph B of this instruction when the injury results only from the possessor's activity and is not causally related to a condition of the premises. *Tatum v. Rester*, 241 Ark. 1059, 412 S.W.2d 293 (1967), supplemental opinion, 242 Ark. 271, 412 S.W.2d 293 (1967). *See also* *Linxwiler v. El Dorado Sports Center, Inc.*, 233 Ark. 191, 343 S.W.2d 411 (1961) (error to give this instruction if the condition of the premises had nothing to do with the plaintiff's injuries).

A person who is lawfully on the premises of an innkeeper is not an invitee as a matter of law under every conceivable circumstance, and there are situations that warrant submitting the issue to the jury. *Holiday Inns, Inc. v. Drew*, 276 Ark. 390, 635 S.W.2d 252 (1982).

A tenant is not an invitee on a landlord's premises since he has an equal right to that of the landlord to exclusive possession of the property. *Wheeler v. Phillips Development Corp.*, 329 Ark. 354, 947

S.W.2d 380 (1997); *Glasgow v. Century Property Fund XIX*, 299 Ark. 221, 772 S.W.2d 312 (1989).

A landlord has no duty to remove hazards such as ice and snow from parts of the premises in common use by the tenants. *Glasgow, supra*.

A live-in companion was held to be a licensee notwithstanding substantial contributions to household expenses. *Tucker v. Sullivan*, 307 Ark. 440, 821 S.W.2d 470 (1991).

The duty owed by an owner or occupier is usually satisfied where the condition creating the danger is either known by or obvious to the invitee. *Jenkins v. International Paper Co.*, 318 Ark. 663, 887 S.W.2d 300 (1994); *Young v. Paxton*, 316 Ark. 655, 873 S.W.2d 546 (1994) (duty met where plaintiff was well apprised of risk involved in cutting tree limbs prior to getting injured while cutting a limb); *Ramsey v. American Auto. Ins. Co.*, 234 Ark. 1031, 356 S.W.2d 236 (1962) (landowner's duty was satisfied where the danger of loading 1,200-lb. wastepaper bales was obvious, whether loaded by hand or by mechanical means). The open and obvious danger rule is inapplicable where, as a practical matter, the invitee is required to encounter the hazard even though he knows of it, or it is of an obvious nature. *Carton v. Missouri Pac. R. Co.*, 303 Ark. 568, 798 S.W.2d 674 (1990); *Kuykendall v. Newgent*, 255 Ark. 945, 504 S.W.2d 344 (1974) (landowner should have anticipated the dangerous condition of accumulated ice and snow on sloping entrance would cause physical harm to one required to use the entrance way notwithstanding the known or obvious danger). There is no duty to warn of obvious dangers or risks that the licensee is expected to recognize. *Nucor Corp. v. Kilman*, 358 Ark. 107, 186 S.W.3d 720 (2004). A landowner who discovers a licensee in peril owes a duty of ordinary care to prevent injury to the licensee. *Lively v. Libbey Memorial Physical Medicine Center, Inc.*, 311 Ark. 41, 841 S.W.2d 609 (1992).

A number of other exceptions to the obvious danger rule are discussed in the authorities cited in *Jenkins, supra*, and *Kuykendall, supra*.

An owner has a duty to warn a licensee of hidden dangers if the licensee does not know or have reason to know of the conditions or risks involved. *Heigle v. Miller*, 332 Ark. 315, 965 S.W.2d 116 (1998).

Research References

West's Key Number Digest
Negligence §1733

Legal Encyclopedias
C.J.S., Negligence §§ 995, 1004 to 1005, 1007, 1010, 1020 to 1021

AMI 1108

ABSOLUTE LIABILITY—ULTRAHAZARDOUS ACTIVITIES

By using _____, _____ is liable for any
(explosives, poisons, etc.) (defendant)
[compensatory] damages sustained by _____ which
(plaintiff)
were proximately caused by the use of the _____.
You need only decide what those [compensatory]
damages are and what amount _____ should recover.
(plaintiff)
_____ has the burden of proving the amount of those
(Plaintiff)
damages and that they were proximately caused by
's use of the _____.
(defendant) (explosives, poisons, etc.)

NOTE ON USE

When punitive damages are in issue, use the bracketed portion of this instruction and also AMI 2218 following other appropriate instructions from Chapter 22.

When negligence is relied on, use AMI 1301, which may be modified if the activity is other than the use of explosives.

When negligence is relied on, use AMI 1301, which may be modified if the activity is other than the use of explosives.

Do not use this instruction where the Arkansas Recreational Use Statute, §§ 18-11-301 et seq., applies and there is no basis for exception to the immunity conferred thereunder.

COMMENT

The rule of absolute liability has been clearly enunciated. *Carroll-Boone Water Dist. v. M. & P. Equipment Co.*, 280 Ark. 560, 661 S.W.2d 345 (1983). Although the court has treated the words "absolute" and "strict" as being synonymous, the Committee has opted for "absolute" in the title to this instruction in order to avoid any confusion with the distinct concept of "strict liability in tort" in product liability cases.

Under Ark. Code Ann. § 18-11-301 et seq., (the "Recreational Use Statute"), an owner owes no duty of care to keep premises safe for entry or use by others for recreational purposes or to give any warning of a

dangerous condition, use, structure or activity on the premises to persons entering for recreational purposes without charge (admission fee) unless the owner maliciously (but not merely negligently) fails to guard or warn against an ultra-hazardous condition or activity actually known to the owner to be dangerous. Ark. Code Ann. §§ 18-11-301 et seq. Act 1112 of 2015 amended Ark. Code Ann. § 18-11-302 to define “malicious” under the Recreational Use Statute to mean “an intentional act of misconduct that the actor is aware is likely to result in harm,” and it “does not mean negligent or reckless conduct.” This amendment was in apparent response to *Roeder v. U.S.*, 2014 Ark. 156, in which the Arkansas Supreme Court, answering a certified question from federal district court, held that “malicious” conduct includes conduct in reckless disregard of the consequences from which malice may be inferred.

Whether the defendant used an instrumentality justifying the giving of this instruction is a question of law. *Chapman Chemical Co. v. Taylor*, 215 Ark. 630, 222 S.W.2d 820 (1949). In that case the aerial spraying of the poison 2-4-D was held to constitute an ultrahazardous activity, whereas the spraying of the herbicide Roundup Ultra was held not to do so in *Mangrum v. Pigue*, 359 Ark. 373, 198 S.W.3d 496 (2004). *But see*, *Carr v. Nance*, 2010 Ark. 497, in which the court noted that the jury was instructed on the definition of ultra-hazardous and appellees did not object. In *Carr* the court held that hanging an unmarked cable at a dangerous height in an area in which the landowner knows there are people traveling on four-wheelers constituted an ultra-hazardous activity for which the landowner was held liable and subject to punitive damages.

AMI 1108 adopts the rationale in *Chapman*, *supra*, that the court decides as a matter of law whether a product is ultrahazardous in order to invoke absolute liability. *Mangrum*, *supra*.

When blasting is conducted on the property damaged with the knowledge and consent of the owner, the rule of absolute liability is not applicable. *Carroll-Boone Water Dist.*, *supra*. However, the theories of absolute liability and negligence are not mutually exclusive. *Western Geophysical Co. of America v. Mason*, 240 Ark. 767, 402 S.W.2d 657 (1966).

Research References

West's Key Number Digest
Negligence ⇨1733

Legal Encyclopedias
C.J.S., Negligence § 176

AMI 1109

ISSUES—ATTRACTIVE NUISANCE—BURDEN OF PROOF

With respect to the question of whether _____ was negligent, _____ has the burden of proving each of the following *[three]* *[four]* propositions:

First: That a condition existed on _____'s premises which *[he]**[she]* knew, or reasonably should have known, involved a reasonably foreseeable risk of harm to children.

Second: That *[he]**[she]* knew, or reasonably should have foreseen, that children would likely be attracted to the area of danger.

[Third: That the expense or inconvenience to _____ in remedying the condition would be slight in comparison to the risk of harm to children.]

[Third] [Fourth]: That the condition was a proximate cause of [any injury to] [the death of] _____.
(Name of child)

If you find that each of these *[three]* *[four]* propositions has been proved by _____, then you are permitted, but not required, to infer that _____ was negligent.

[On the other hand, if you find that any of these propositions has not been proved, then _____ cannot recover in this case.]

NOTE ON USE

Do not use final paragraph if the case is submitted on interrogatories.

In most cases the third proposition will not be in issue and should be omitted.

If there is a question of negligence on the part of the child, use AMI 304.

COMMENT

It is not necessary that the child be attracted by the dangerous condition itself; there may be some other attraction nearby. *Standard Oil Co. of Louisiana v. Dumas*, 183 Ark. 616, 38 S.W.2d 17 (1931).

The third proposition, that of weighing the cost of remedying the situation with the degree of hazard to the child, has not been specifically approved in Arkansas. The Court did observe in *Nashville Lumber Co. v. Busbee*, 100 Ark. 76, 139 S.W. 301 (1911), that dangerous machinery could have been enclosed at a cost of from \$2.50 to \$20.00. This matter of balancing the cost against the risk was first stated in the *RESTATEMENT, TORTS* § 339 (1934), and has since been widely approved. *Prosser, TORTS*, § 59 (3d ed., 1964).

The doctrine of attractive nuisance may not apply to older children. *Ibid.*

A pond is not ordinarily an attractive nuisance. *Carmichael v. Little Rock Housing Authority*, 227 Ark. 470, 473, 299 S.W.2d 198, 200 (1957) (holding that a pond was not an attractive nuisance and writing, "The weight of authority in this country is to the effect that ponds, lakes, streams, reservoirs, and other bodies of water do not constitute an attractive nuisance in the absence of any unusual element of danger."); *Jones v. Comer*, 237 Ark. 500, 374 S.W.2d 465 (1964) (attractive nuisance doctrine inapplicable where there was no evidence that partly submerged boat in pond contributed to children's drownings or that bag swing at least 150 feet away from pond was involved in drownings); *Cooper v. Diesel Service, Inc.*, 254 Ark. 743, 496 S.W.2d 383 (1973) (bank of pond that dropped off suddenly did not constitute a trap, and attractive nuisance doctrine did not apply); *Powell v. ISC North, LLC*, 2017 Ark. App. 394, 524 S.W.3d 458 (partially submerged truck-bed liner in pond did not mask inherently dangerous nature of pond so as to create a jury question under attractive nuisance doctrine).

In *Poston v. Fears*, 318 Ark. 659, 662, 887 S.W.2d 520, 522 (1994), the court did not consider whether the attractive nuisance doctrine applied in a case involving a residential swimming pool because the plaintiffs had failed to factually state a cause of action under attractive nuisance principles, but the court wrote that a case involving a residential swimming pool would be one of "first impression" and that "liability for deaths of very young children in private swimming pools may invoke different considerations, both legal and factual.").

Research References

West's Key Number Digest
Negligence ⇨ 1733

11: Legal Encyclopedias

C.J.S., Negligence §§ 995, 1004 to 1005, 1007, 1010, 1020 to 1021

AMI 1110

**DUTY OWED BY OWNER OR OCCUPIER OF LAND—
INJURIES OR DAMAGES OFF PREMISES**

It is the duty of an [owner] [occupier] of land to protect [persons] [and] [property] on land of another from damages resulting from [a structure] [an artificial condition] upon [his][her] land if

(A) [he][she] knows, or should know, of an unreasonable danger created by that [structure] [condition] and

[(B) [he][she] knows, or should know, that the danger exists without the consent of those affected by it, and]

(C) [he][she] fails, after having a reasonable opportunity, to eliminate the danger or otherwise to protect such [persons] [or] [property] against it.

A violation of this duty is negligence.

NOTE ON USE

Use subparagraph (B) only when consent is an issue.

COMMENT

This instruction is based on *Dye v. Burdick*, 262 Ark. 124, 553 S.W.2d 833 (1977) (citing RESTATEMENT (SECOND) OF TORTS § 366 (1965)), a case involving the failure of an artificial dam.

Tri-B Advertising Co. v. Thomas, 278 Ark. 58, 643 S.W.2d 547 (1982) held that this instruction was properly given where a billboard was blown over by a storm damaging the adjacent owner's property.

The use of this instruction is strictly limited to the situation in which a structure or condition on the defendant's land causes damages on the premises of another person.

Aluminum Company of America v. Guthrie, 296 Ark. 269, 753 S.W.2d 538 (1988).

This instruction does not apply to measures taken by an owner to divert or fend off surface water where he acts in good faith and is free of negligence. *Smith v. Cruthis*, 255 Ark. 217, 499 S.W.2d 852 (1973); *Timmons v. Clayton*, 222 Ark. 327, 259 S.W.2d 501 (1953).

Research References

West's Key Number Digest
Negligence \approx 1733

Legal Encyclopedias
C.J.S., Negligence §§ 995, 1004 to 1005, 1007, 1010, 1020 to 1021

CHAPTER 12

CONSTRUCTION

Table of Instructions

AMI

- 1201. Duty of Care—Traveler with Knowledge of Construction Activity.
- 1202. Highway Contractor—Duty to Maintain Safe Passage.
- 1203. Contractor—Standard of Care.
- 1204. Architect, Engineer—Standard of Care.
- 1205. Issues—Breach of Implied Warranty of Habitability, Sound Workmanship, and Proper Construction in the Sale of a House.
- 1206. Extension of Implied Warranties to a Subsequent Purchaser of a House.
- 1207. Defense—Exclusion or Waiver of Implied Warranties of Habitability, Sound Workmanship, and Proper Construction.
- 1208. Definition—Habitability

AMI 1201

DUTY OF CARE—TRAVELER WITH KNOWLEDGE OF CONSTRUCTION ACTIVITY

A traveler upon a *[highway]* *[street]* which is open to the public while under *[construction]* *[or]* *[repair]*, in the absence of notice to the contrary, may assume that the way is reasonably safe for travel. Although *[he]**[she]* is not required to anticipate unusual obstructions, *[he]**[she]* is required to use ordinary care for *[his]**[her]* own safety *[and for the safety of others]*.

COMMENT

This instruction is based on an instruction approved in *McGeorge Contracting Co. v. Mizell*, 216 Ark. 509, 226 S.W.2d 566 (1950).

Research References

West's Key Number Digest
Automobiles ⚡309

Legal Encyclopedias
C.J.S., Motor Vehicles §§ 559, 579

AMI 1202

**HIGHWAY CONTRACTOR—DUTY TO MAINTAIN
SAFE PASSAGE**

It was the duty of _____ in the performance of
(defendant)
the construction work to use ordinary care to provide
for the safety of the traveling public and to give rea-
sonable warning to travelers of any hazards created
by [his][her] activities. [It was also the duty of _____
(defendant)
to use ordinary care to comply with the provisions of
[his][her] contract with _____ that were inserted
for the safety of the public.]

NOTE ON USE

The bracketed phrase may be used when duties are imposed by contract upon a contractor for the safety of the public.

COMMENT

The first sentence of the instruction is based on an instruction approved in *Hill v. Whitney*, 213 Ark. 368, 210 S.W.2d 800 (1948), and *McGeorge Contracting Co. v. Mizell*, 216 Ark. 509, 226 S.W.2d 566 (1950). The bracketed sentence is based on an instruction approved in *Hogan v. Hill*, 229 Ark. 758, 318 S.W.2d 580 (1958). See *Lopez v. Mendez*, 432 F.3d 829 (8th Cir. 2005) (instruction correctly states Arkansas law with regard to a contractor's duty to protect the public).

Those engaged in work upon the surface of the highway are not required to observe statutory rules of the road. Ark. Code Ann. § 27-49-110; *McMillin v. Bearden*, 237 Ark. 673, 376 S.W.2d 665 (1964) (mere fact that grader operator was on left-hand side of the road was not sufficient to establish negligence).

Research References

West's Key Number Digest
Automobiles ⇨309; Highways ⇨214

Legal Encyclopedias
C.J.S., Highways §§ 355, 359; Motor Vehicles §§ 559, 579

AMI 1203

CONTRACTOR—STANDARD OF CARE

In determining whether _____ was negligent, you
(defendant)
may consider the degree of skill and care ordinarily possessed and used by contractors doing work similar to that shown by the evidence in this case.

NOTE ON USE

This instruction should follow AMI 302, 303, and 305.

COMMENT

This instruction (then AMI 1204) was approved in *Center v. Johnson*, 295 Ark. 522, 527, 750 S.W.2d 396, 399 (1988) (using instruction with AMI 302, 303, and 305).

Arkansas law subjects contractors to both the standard of care of the custom and industry and the standard of care of a reasonably prudent person. *Dixon v. Ledbetter*, 262 Ark. 758, 760, 561 S.W. 2d 294, 295 (1978) ("That a contractor uses customary methods is a matter to be considered, but that standard does not necessarily meet the test of ordinary care."). "It has been held that where a contractor is held to both custom and industry standards and to the standard which would be followed by a reasonably prudent man then the more exacting standard will control." *Smith v. Aaron*, 256 Ark. 414, 416, 508 S.W. 2d 320, 321 (1974) (citing *Ferguson v. Ben M. Hogan Co.*, 307 F. Supp. 658, 663 (W.D. Ark. 1969) (industry cannot be permitted to establish its own uncontrolled standard by adopting careless methods to save time, effort, and money)). Both *Dixon* and *Smith* rely on *Baker v. Pidgeon Thomas Co.*, 422 F.2d 744 (6th Cir. 1970), a diversity case applying Arkansas law, in which the court criticized the instructions given in the case because they did not make clear that the contractor was subject to both standards of a reasonable man and a reasonable contractor. The court found that the jury may have believed that the industry standard superseded and/or defined the reasonable man standard. *Id.* at 747-48.

A contractor performing a contract for the state or a political subdivision and under its supervision shares in the sovereign immunity, and if damages result from something inherent in the plans and specifications required by the public agency, the contractor is not liable unless he is negligent or commits a wrongful tort. *Southeast Constr. Co. v. Ellis*, 233 Ark. 72, 76-78, 342 S.W.2d 485, 488 (1961). This immunity enjoyed by the contractor is referred to as the acquired-immunity

doctrine. *Smith v. Rogers Grp., Inc.*, 348 Ark. 241, 249, 72 S.W. 3d 450, 454–55 (2002). This rule does not protect a contractor who performs work in a negligent manner resulting in damages to others. *Guerin Contractors v. Reaves Food Ctr.*, 270 Ark. 710, 714, 606 S.W.2d 143, 145 (Ark. App. 1980) (negligence shown). *See Souter v. Carruthers*, 237 Ark. 590, 592–93, 374 S.W.2d 474, 475 (1964) (no negligence established); *Ben M. Hogan Co. v. Fletcher*, 236 Ark. 951, 953, 370 S.W.2d 801, 802 (1963) (no negligence established); *Stanton—White Dredging Co. v. Braden*, 137 Ark. 127, 133–34, 208 S.W. 598, 600 (1919) (negligence established). *See also Lopez v. Mendez*, 432 F.3d 829, 833–35 (8th Cir. 2005) (discussing acquired-immunity doctrine and finding negligent performance).

The acquired-immunity doctrine should not be confused with the accepted-work doctrine. Under the accepted-work doctrine, once a contractor's construction or repair of any public-owned improvement to public property is accepted, he cannot be held liable to third parties as a result of defects in the work. Ark. Code Ann. § 16-56-112 (reinstating and codifying the accepted-work doctrine after it was abolished in *Suneson v. Holloway Constr.*, 337 Ark. 571, 992 S.W.2d 79 (1999)).

Research References

West's Key Number Digest
Negligence §1738

Legal Encyclopedias
C.J.S., Negligence §§ 995, 1004 to 1005, 1010

AMI 1204

ARCHITECT, ENGINEER—STANDARD OF CARE

An *[architect][engineer]* must possess and apply with reasonable care the degree of skill and learning ordinarily possessed and used by members of *[his][her]* profession in good standing, doing work similar to that shown by the evidence in this case. A failure to meet this standard is negligence.

[In determining the degree of skill and learning the law required of _____ (and) (in deciding whether
(defendant)

_____ used the degree of skill and learning the law
(defendant) required of *[him] [her]*], you may consider only the evidence presented by the *(architects) (engineers)* called as expert witnesses *(and) (evidence of professional standards presented in the trial)*. In considering the evidence on any other issue in this case, you are not required to set aside your common knowledge, but you have a right to consider all the evidence in light of your own observations and experiences in the affairs of life.]

NOTE ON USE

The bracketed paragraph must be given unless the court determines that expert testimony is not necessary because the case falls within the common knowledge exception. If it is used, do not use AMI 104. Also use AMI 107 if the bracketed paragraph is given or if expert testimony is presented.

Do not use this instruction when the cause of action is based on breach of contract, but only when it is based on negligence.

COMMENT

The locality rule which applies to malpractice claims against medical care providers does not apply to malpractice claims against architects or engineers. *Hill Const. Co. v. Bragg*, 291 Ark. 382, 725

S.W.2d 538 (1987); *Carroll-Boone Water Dist. v. M. & P. Equip. Co.*, 280 Ark. 560, 661 S.W.2d 345 (1983).

While no Arkansas case has specifically required that an instruction in a negligence case against an architect or engineer embody the professional standard of care set forth in this instruction, no criticism of such an instruction was mentioned in *Hill Const. Co.*, *supra*, or *Carroll-Boone Water Dist.*, *supra*, other than the criticism of the locality rule. This instruction is in line with the overwhelming weight of authority in other jurisdictions, as set forth in 3 A.L.R.4th 1023, "Necessity of expert testimony to show malpractice of architect," and STEIN, CONSTRUCTION LAW, Vol. 2, § 5A.04[2], pp. 65-66.

In *Clark v. Transcontinental Ins. Co.*, 359 Ark. 340, 197 S.W.3d 449 (2004), the Court held that a question of fact for the jury was presented when the plaintiff submitted an affidavit of an architect in opposition to a motion for summary judgment filed by the defendant architect, which affidavit stated that the defendant architect failed to apply the knowledge and skill ordinarily used by a reasonably well-qualified architect. The *Clark* Court quoted 5 AM. JUR. 2D, Architects § 10 (1995), which provides:

In contracting for the provision of architectural services, an architect implies that he or she possesses and will exercise and apply skill, ability, judgment, and taste reasonably and without neglect. . . . The skill and diligence which the architect is bound to exercise are that ordinarily required of architects, and the efficiency of an architect in the preparation of plans and specifications is tested by the rule of ordinary and reasonable skill usually exercised by one in that profession.

AMI 1205

**ISSUES—BREACH OF IMPLIED WARRANTY OF
HABITABILITY, SOUND WORKMANSHIP, AND
PROPER CONSTRUCTION IN THE SALE OF A
HOUSE**

[Unless excluded or waived,] there are implied warranties of habitability, sound workmanship, and proper construction in the sale of a new house by a seller who was also the builder.

In this case _____ claims damages on the ground
(plaintiff)
that _____ breached *[one or more of]* the implied
(defendant)
warranty[ies] of *[habitability, sound workmanship,
[and][or] proper construction in the sale of a house]*.
In order to recover, _____ must prove each of four es-
(plaintiff)
sential propositions:

First, that *[he][she]* has sustained damages;

Second, [that _____ is a professional builder
(defendant)
who built the house and sold it new to _____] *[or]*
(plaintiff)
*[that defendant is a professional builder who built the
house and sold it new to a prior purchaser]*.

Third, that the house failed to conform to the war-
ranty[ies] that the house was *[[habitable] [and][or]
[constructed with sound workmanship] [and][or]
properly constructed]]*; *[and]*

Fourth, that _____ gave notice to _____ in a rea-
(plaintiff) (defendant)
sonable time with sufficient clarity to inform _____
(defendant)
that a breach of the implied warranty[ies] is being as-

serted and to give _____ sufficient opportunity to
(defendant)
inspect the premises and correct the defects.

[If you find that _____ has proved each of these
(plaintiff)
propositions, then your verdict should be for _____.
(plaintiff)
If, however, _____ has failed to prove any one or more
(plaintiff)
of these propositions [or _____ proves that the
(defendant)
implied warranty[ies] [has] [have] been excluded or
waived], then your verdict should be for _____.]
(defendant)

NOTE ON USE

Use AMI 1206 with this instruction when the plaintiff is a subsequent purchaser of the house.

Use AMI 1207 with this instruction when the defendant claims the implied warranties have been excluded or waived.

Because the implied warranties of habitability, sound workmanship, and proper construction are implied in the contract of sale, use AMI 2442, with modification for breach of implied warranty, as the damage instruction.

Do not use the last bracketed paragraph if the case is submitted on interrogatories.

COMMENT

"There is an implied warranty of fitness and habitability in the sale of a new house by a seller who was also the builder." Curry v. Thornsberry, 354 Ark. 631, 128 S.W.3d 438 (2003). "By operation of law, a builder-vendor gives implied warranties of habitability, sound workmanship, and proper construction. The implied warranty does not rest upon an agreement, but arises by operation of law and is intended to hold the builder-vendor to a standard of fairness." Bullington v. Palangio, 345 Ark. 320, 45 S.W.3d 834 (2001); Wawak v. Stewart, 247 Ark. 1093, 449 S.W.2d 922 (1970). This rule has been applied in situations where the purchaser has supplied plans for the house and there is poor workmanship or faulty design in the implementation of those plans by the builder. Pickler v. Fisher, 7 Ark. App. 125, 644 S.W.2d 644 (1983); Daniel v. Quick, 270 Ark. 528, 606 S.W.2d 81 (1980).

"The warranty of habitability is implied in the contract of sale and

arises from that contract.” *Curry, supra*. In *Curry*, the Court determined that since an action for breach of the implied warranty of habitability is an action in contract, an award of attorney fees may be proper under Ark. Code Ann. § 16-22-308.

In a case involving a contract for the construction of a roof with skylights over an existing indoor pool area, the Court found that a contractor who was not a builder-vendor nonetheless gave implied warranties of sound workmanship and proper construction. *Graham Constr. Co. v. Earl*, 362 Ark. 220, 208 S.W.3d 106 (2005).

Proof of proximate causation is not an element of a claim for breach of the implied warranties of habitability, sound workmanship, and proper construction. *Crumpacker v. Gary Reed Constr., Inc.*, 2010 Ark. App. 179 (summary judgment reversed because plaintiff not required to show that defendant’s workmanship caused damage).

In *Cinnamon Valley Resort v. EMAC Enterprises, Inc.*, 89 Ark. App. 236, 202 S.W.3d 1 (2005), a case involving the construction of two luxury log cabins for a resort, the appellate court approved the combination of an issue instruction that included the element of notice to the defendant in a reasonable time of its failure to perform work in a good and workmanlike manner and a separate instruction that the notice “only needed to be of sufficient clarity to apprise [defendant] of the alleged defects and problems being asserted, and to give [defendant] sufficient opportunity to inspect the premises and correct the alleged defects and problems.” The essence of the two instructions on the issue of notice in *Cinnamon Valley* have been included in the fourth element of this instruction.

Absent fraudulent concealment, the statute of repose set out in Ark. Code Ann. § 16-56-112 will bar a claim for breach of the implied warranty of habitability brought five years after substantial completion of the house. *Rogers v. Mallory*, 328 Ark. 116, 941 S.W.2d 421 (1997) (finding that the court’s holdings in cases such as *Sanders v. Walker*, 298 Ark. 374, 767 S.W.2d 526 (1989), and *Blagg v. Fred Hunt Co.*, 272 Ark. 185, 612 S.W.2d 321 (1981), that the implied warranty of habitability extends to subsequent purchasers and exists for a “reasonable length of time” is nonetheless subject to Ark. Code Ann. § 16-56-112).

“The cost of correcting defects, rather than the difference in value, is the proper measure of damages [for a breach of the implied warranties of habitability, sound workmanship, and proper construction] when the correction would not involve unreasonable destruction of the work; and the cost of repairs would not be grossly disproportionate to the results to be obtained.” *Daniel, supra* (citing *Carter v. Quick*, 263 Ark. 202, 563 S.W.2d 461 (1978)). However, as explained in *Page v. Ballard*, 2011 Ark. App. 357, a plaintiff may elect to seek damages based on the difference in value rather than the cost of correcting the defects. If so, the defendant may affirmatively challenge the plaintiff’s selection of damages by presenting alternative damages evidence and seeking a

jury instruction. In *Page*, the court held that it was not error to give a damages instruction based on the difference in value where the defendant did not present evidence of the cost to correct defects. *See also Carter, supra* (burden of proving that the cost of correcting defects was disproportionate, or an economic waste, was on the defendant). In certain instances, the court may instruct the jury on both measures of damage and allow it to select the one that is appropriate. *Page, supra*.

Ordinarily, notice must be given in a reasonable time with sufficient clarity to apprise the vendor-builder that a breach of implied warranty is being asserted and to give him sufficient opportunity to inspect the premises and correct the defects. *Pickler, supra*.

Breach of the implied warranties of habitability, sound workmanship, and proper construction can also be based upon faulty design by the builder-vendor. *Wingfield v. Page*, 278 Ark. 276, 644 S.W.2d 940 (1983); *Coney v. Stewart*, 263 Ark. 148, 562 S.W.2d 619 (1978). The implied warranty extends to a septic tank, which is an integral part of the house. *Coney, supra*.

When a contract for residential construction contains an express warranty on a subject, that warranty is exclusive and there can be no implied warranty on that subject. *Carter, supra*. However, in order for an express warranty to exclude the implied warranties of habitability, sound workmanship, and proper construction, the express warranty must expressly promise habitability, sound workmanship, and proper construction. *Bullington, supra; Wingfield, supra*.

There are no implied warranties of habitability, sound workmanship, and proper construction where the sellers are not professional builders and lived in the house before selling it. *Morris v. Rush*, 77 Ark. App. 11, 69 S.W.3d 876 (2002).

Unless an environmental contaminant exists or has occurred in an improvement on real estate, an improvement on real estate (including a house) is not a "product" for purposes of a products liability action. *See Ark. Code Ann. § 4-86-102 (c)(2)*. However, any tangible object or good produced that is affixed to, installed on, or incorporated into real estate or any improvement on real estate is considered a "product." *Id.*

AMI 1206

**EXTENSION OF IMPLIED WARRANTIES TO A
SUBSEQUENT PURCHASER OF A HOUSE**

In this case, _____ did not purchase the house
(plaintiff)
from _____. The implied warranties of habitability,
(defendant)
sound workmanship, and proper construction may be
extended to _____ as a subsequent purchaser. In or-
(plaintiff)
der to extend these warranties to _____, [he][she] has
(plaintiff)
the burden of proving each of four essential
propositions:

First, that there has been no substantial change
or alteration in the condition of the house from the
original sale;

Second, the defects in the house were not discov-
erable by _____ by reasonable inspection;
(plaintiff)

Third, the defects in the house became clearly
apparent only after the purchase of the house; and

Fourth, _____ asserted [his][her] claim against
(plaintiff)
_____ within a reasonable length of time from
(defendant)
_____ original sale of the house.
(defendant's)

NOTE ON USE

Use this instruction with AMI 1205 when the plaintiff is a
subsequent purchaser of the house.

COMMENT

"[T]he builder-vendor's implied warranty of fitness for habitation

runs not only in favor of the first owner, but extends to subsequent purchasers for a reasonable length of time where there is no substantial change or alteration in the condition of the building from the original sale. This implied warranty is limited to latent defects which are not discoverable by subsequent purchasers upon reasonable inspection and which become manifest only after the purchase." *Blagg v. Fred Hunt Co.*, 272 Ark. 185, 187, 612 S.W.2d 321, 322 (1981).

Where a subsequent purchaser has knowledge of the defect, he cannot recover for breach of the implied warranties. *Bankston v. McKenzie*, 287 Ark. 350, 698 S.W.2d 799 (1985).

Absent fraudulent concealment, the statute of repose set out in Ark. Code Ann. § 16-56-112 will bar a claim for breach of the implied warranty of habitability brought more than five years after substantial completion of the house. *Rogers v. Mallory*, 328 Ark. 116, 941 S.W.2d 421 (1997) (finding that the court's holdings in cases such as *Sanders v. Walker*, 298 Ark. 374, 767 S.W.2d 526 (1989), and *Blagg, supra*, that the implied warranty of habitability extends to subsequent purchasers and exists for a "reasonable length of time" is nonetheless subject to Ark. Code Ann. § 16-56-112).

AMI 1207

DEFENSE—EXCLUSION OR WAIVER OF IMPLIED WARRANTIES OF HABITABILITY, SOUND WORKMANSHIP, AND PROPER CONSTRUCTION

 contends and has the burden of proving
(Defendant) that the implied warranty[ies] of *[habitability,] [sound workmanship,] [and proper construction] [was] [were]* excluded or waived. Such warranty[ies] *[is] [are]* excluded or waived when circumstances surrounding transactions are themselves sufficient to call the buyer's attention to the fact that such implied warranties are excluded or waived. You must determine whether there existed sufficient circumstances surrounding the transaction to call attention to
(plaintiff's) the fact that the implied warranty[ies] of *[habitability,] [sound workmanship,] [and proper construction] [was] [were]* excluded or waived.

NOTE ON USE

Use this instruction when the defendant asserts the exclusion or waiver of an implied warranty.

COMMENT

"[I]mplied warranties may be excluded when the circumstances surrounding the transaction are in themselves sufficient to call the buyer's attention to the fact that no implied warranties are made or that a certain implied warranty is excluded." *O'Mara v. Dykema*, 328 Ark. 310, 942 S.W.2d 854 (1997). As a matter of law, the implied warranty of habitability is excluded when the buyer purchases the property "as is." *Id.*; *Bankston v. McKenzie*, 287 Ark. 350, 698 S.W.2d 799 (1985); *Morris v. Rush*, 77 Ark. App. 11, 69 S.W.3d 876 (2002).

When a contract for residential construction contains an express warranty on a subject, that warranty is exclusive and there can be no implied warranty on that subject. *Carter v. Quick*, 263 Ark. 202, 563 S.W.2d 461 (1978). However, in order for an express warranty to exclude the implied warranties of habitability, sound workmanship, and proper construction, the express warranty must expressly promise habitability,

sound workmanship, and proper construction. *Bullington v. Palangio*, 345 Ark. 320, 45 S.W.3d 834 (2001); *Wingfield v. Page*, 278 Ark. 276, 644 S.W.2d 940 (1983).

Waiver of defects is a question of fact to be determined from the circumstances of the case. *Carter, supra*. In *Carter*, the Court found that each of the following circumstances do not, alone, constitute waiver of the defects by the purchaser and that such circumstances should be considered collectively: acceptance upon assurances that defects would be corrected; acceptance and occupancy by the owner of the land upon a promise that defects would be corrected; and payment of the contract price and occupancy by owner, even with knowledge of defects. *Id.*

AMI 1208

DEFINITION—HABITABILITY

A building is habitable when it is reasonably fit to live in and is reasonably free of serious defects that threaten life, health or safety.

NOTE ON USE

Use this instruction where the term “habitability” is used in AMI 1205, 1206, or 1207.

COMMENT

Arkansas courts have not expressly defined the term “habitability.” This instruction is derived from model instructions from Alabama as well as a common definition of “habitability.”

Habitability is defined as “[t]he condition of a building in which inhabitants can live free of serious defects that might harm health and safety.” BLACK’S LAW DICTIONARY 779 (9th ed., 2009). In Alabama, “[t]he implied warranty of habitability for a residence means that the residence is reasonably fit for living quarters.” 1 ALA. PATTERN JURY INSTR. CIV. 10.15 (2d ed.).

CHAPTER 13

EXPLOSIVES

Table of Instructions

AMI

1301. Negligence—Use of Explosives.

AMI 1301

NEGLIGENCE—USE OF EXPLOSIVES

It is the duty of one using explosives to use no greater quantity than is reasonably necessary and to use a high degree of care, commensurate with the danger reasonably to be expected, in order to avoid injury to *[the property of]* others. A violation of this duty is negligence.

NOTE ON USE

This instruction is not applicable if the case is submitted solely on a theory of absolute liability. See AMI 1108.

COMMENT

An explosives case may be pursued under a negligence theory, a strict liability theory, or both. See *Northside Const. Co. v. Huffman*, 287 Ark. 145, 697 S.W.2d 89 (1985). In *Northside*, the jury was instructed on both absolute liability and negligence, but the jury was only given verdict forms for negligence. Consequently, the opinion only discusses negligence and proximate causation. A prima facie case of negligence is established where the evidence of the results and surrounding circumstances of a blast show that under ordinary circumstances such a result could not have occurred unless the blast was negligently performed. *Id.*

With respect to a claim by the owner, when blasting is conducted on the property damaged with the knowledge and consent of the owner, the rule of strict liability is not applicable. *Carroll-Boone Water Dist. v. M. & P. Equipment Co.*, 280 Ark. 560, 661 S.W.2d 345 (1983) ("It would be unfair to allow a property owner to employ a contractor to use dynamite on the property and then recover for damage caused by the dynamite with no proof of negligence.") See 2 D. DOBBS, *LAW OF TORTS* 955-957 (2001), for discussion of other explosives-related cases in which a negligence theory may be applicable.

See *Continental Geophysical Co. v. Adair*, 243 Ark. 589, 420 S.W.2d 836 (1967), for a case in which there was a failure of proof to show a causal relationship between the defendant's detonations and damage to plaintiff's wells.

Research References

West's Key Number Digest
Explosives ⇨ 10, 12

Legal Encyclopedias
C.J.S., Explosives §§ 12, 62 to 67, 89 to 90

CHAPTER 14

ELECTRICITY

Table of Instructions

AMI

- 1401. Electricity—Duties in Installation, Inspection, and Repair.
- 1402. Electricity—Duty to Insulate or Isolate Electric Wires.
- 1403. Duty to Comply with National Electrical Safety Code.
- 1404. Duty to Warn of Danger.
- 1405. Electricity—Res Ipsa Loquitur.

AMI 1401

ELECTRICITY—DUTIES IN INSTALLATION, INSPECTION, AND REPAIR

It is the duty of an electric company to use ordinary care [to provide and install proper electrical service equipment] [and] [to make continuing reasonable and proper inspections of its electrical service equipment] [and] [to discover and repair defects in its electrical service equipment].

COMMENT

This instruction is based on the holdings in *Arkansas Power & Light Co. v. Lum*, 222 Ark. 678, 262 S.W.2d 920 (1953); *Arkansas General Utilities v. Shipman*, 188 Ark. 580, 67 S.W.2d 178 (1934); *Morgan v. Cockrell*, 173 Ark. 910, 294 S.W. 44 (1927); and *Arkansas Light & Power Co. v. Cullen*, 167 Ark. 379, 268 S.W. 12 (1925).

For a discussion of the duties of an electrical power company, see *Clark v. Transcontinental Insurance Company*, 359 Ark. 340, 197

S.W.3d 449 (2004), and *Stacks v. Arkansas Power & Light Co.*, 299 Ark. 136, 771 S.W.2d 754 (1989).

Research References

West's Key Number Digest
Electricity ☞19(13)

Legal Encyclopedias
C.J.S., Electricity §§ 79 to 94, 127

AMI 1402

**ELECTRICITY—DUTY TO INSULATE OR ISOLATE
ELECTRIC WIRES**

It is the duty of a supplier of electricity to use ordinary care either to insulate its wires or to place them so there is no reasonable expectation that others will come in contact with them.

COMMENT

This instruction is based on the holdings in *Arkansas Power & Light Co. v. Lum*, 222 Ark. 678, 262 S.W.2d 920 (1953), *Arkansas Power & Light Co. v. Hoover*, 182 Ark. 1065, 34 S.W.2d 464 (1931), and *Arkansas Power & Light Co. v. Cates*, 180 Ark. 1003, 24 S.W.2d 846 (1930).

Research References

West's Key Number Digest
Electricity ⇨19(13)

Legal Encyclopedias
C.J.S., Electricity §§ 79 to 94, 127

AMI 1403

**DUTY TO COMPLY WITH NATIONAL ELECTRICAL
SAFETY CODE****NOTE ON USE**

Use AMI 601 and insert the appropriate portion of the Code.

COMMENT

The Arkansas Public Service Commission has adopted the construction standards of the NESC. See *Woodruff Elec. Co-op. Corp. v. Daniel*, 251 Ark. 468, 472 S.W.2d 919 (1971).

A violation of the NESC is evidence of negligence. *Arkansas Valley Elec. Co-op. Corp. v. Davis by Davis*, 304 Ark. 70, 800 S.W.2d 420 (1990).

Research References

West's Key Number Digest
Electricity ¶19(13)

Legal Encyclopedias
C.J.S., Electricity §§ 79 to 94, 127

AMI 1404

DUTY TO WARN OF DANGER

COMMENT

The Committee has not drafted an instruction on this subject because a model instruction covering this duty is impractical.

First, the duty would vary with respect to the extent of the danger, whether the injured party be an invitee, licensee, or trespasser, whether he be a child or a person of mature years, etc.

Second, there is no precedent in Arkansas case law for an instruction which singles out this particular duty. The only two cases referring to the duty to warn of danger involve an adult rightfully on the premises. In *Arkansas Power & Light Co. v. Thompson*, 196 Ark. 1012, 120 S.W.2d 709 (1938), the power company erected a guy wire in a front yard with permission of the owner of the premises but while the tenant-plaintiff was absent. The tenant returned home after dark, went into the yard to get some bedclothing off the line, and stumbled over the stob to which the guy wire was attached. The tenant had no knowledge of the construction. The failure to warn plaintiff was incorporated in an approved instruction which contained a number of other elements. In *Southwestern Gas & Electric Co. v. Murdock*, 183 Ark. 565, 37 S.W.2d 100 (1931), the garageman, Murdock, was injured because a 110 volt line in his garage became charged with about 350 volts while the power company was doing some construction work in the vicinity. The last sentence of the decision is the only place where the duty to warn is mentioned: "It was the duty of the appellant to protect appellee from the injury while constructing its wires, and, if there were a danger, to warn him."

AMI 1405

ELECTRICITY—RES IPSA LOQUITUR

COMMENT

No distinction appears between the doctrine of *res ipsa loquitur* as applied to electricity cases and the doctrine generally. See *Arkansas General Utilities Co. v. Shipman*, 188 Ark. 580, 67 S.W.2d 178 (1934); *Pine Bluff Co. v. Bobbitt*, 168 Ark. 1019, 273 S.W. 1 (1925); *Arkansas Light & Power Co. v. Jackson*, 166 Ark. 633, 267 S.W. 359 (1924); *Com. Public Service Co. v. Lindsay*, 139 Ark. 283, 214 S.W. 9 (1919); *Southwestern Telegraph & Telephone Co. v. Bruce*, 89 Ark. 581, 117 S.W. 564 (1909).

See AMI 610.

Research References

West's Key Number Digest
Electricity ◊19(13)

Legal Encyclopedias
C.J.S., Electricity §§ 124, 127

CHAPTER 15

MALPRACTICE AND BREACH OF FIDUCIARY DUTY

Table of Instructions

AMI

- 1501. Duty of Physician, Surgeon, Dentist or Other Medical Care Provider.
- 1502. Duty of Referring Physician, Surgeon, or Dentist.
- 1503. Imputed Conduct.
- 1504. Duty of Hospital, Sanitarium, or Nursing Home.
- 1505. Duty to Prevent Spread of Contagious Disease.
- 1506. Issues—Claim for Damages Based on Medical Injury—Informed Consent—Burden of Proof.
- 1507. Issues—Claim for Damages Based on Informed Consent—Negligence—Burden of Proof.
- 1508. Duty to Obtain Informed Consent.
- 1509. Proximate Cause—Informed Consent.
- 1510. Duty of Attorney—Negligence.
- 1511. Factors—Proximate Cause—Attorney Negligence.
- 1512. Issues—Claim for Damages Based Upon Breach of Fiduciary Duty.
- 1513. Fiduciary Duty—Definition—Relationship Undisputed.

AMI 1501

DUTY OF PHYSICIAN, SURGEON, DENTIST OR OTHER MEDICAL CARE PROVIDER

In (*diagnosing the condition of*) (*treating*) (*operating upon*) (*obtaining the informed consent of*) a patient, a (*physician*) (*surgeon*) (*dentist*) (*medical care provider*) must possess and apply with reasonable care the degree of skill and learning ordinarily possessed and used by members of [*his*]/[*her*] profession in good standing, engaged in the same (*type of ser-*

vice) [or] (*specialty*) in the locality in which [*he*][*she*] practices, or in a similar locality. A failure to meet this standard is negligence.

[In determining the degree of skill and learning the law required and in deciding whether _____ applied the degree of skill and learning which the law required, you may consider only the expert testimony provided by _____.]
(defendant)
(the qualified medical expert(s))

[In deciding whether any negligence of _____ was a proximate cause of injuries to _____ that would not otherwise have occurred, you may consider only the expert testimony provided by _____.]
(defendant)
(plaintiff)
(qualified medical expert(s))

[In considering the evidence on any other issue in this case, you are not required to set aside your common knowledge, but you have a right to consider all the evidence in light of your own observations and experiences in the affairs of life.]

NOTE ON USE

The first bracketed paragraph must be given unless the court determines that expert testimony is not necessary because the case falls within the common knowledge exception. If the first bracketed paragraph is used, do not use AMI 302. The second blank should be used to refer to the expert witnesses determined by the trial court to be qualified to testify as to the standard of care. The expert witnesses may be referred to either by name or by service, e.g., the "spine surgeons."

The second bracketed paragraph must be given unless the issue of proximate cause is not in dispute, or the court determines that expert testimony is not necessary because the issue of proximate cause falls within the common knowledge exception. The blank that refers to "qualified medical expert" should be used to identify those medical experts the trial court deems qualified to testify about proximate causation. Such experts may be referred to either by name or by category, e.g., medical doctors.

If either bracketed paragraph is used, or if expert testimony is presented, also use AMI 107. If the first and/or second bracketed paragraph is used, use the third bracketed paragraph and do not use AMI 104.

If informed consent is the only issue, use AMI 1506 and do not use this instruction. If informed consent is an issue along with negligence, use AMI 1507 and do not use this instruction. If the plaintiff claims that the medical care provider failed to obtain any consent to treatment from the patient when consent was required, rather than that the medical care provider failed to provide adequate information, this instruction should be modified accordingly.

COMMENT

This instruction accurately states the law. *Engleman v. McCullough*, 2017 Ark. App. 613, 535 S.W.3d 643 (2017). This instruction is based on Ark. Code Ann. § 16-114-206(a). Previously identified as AMI 1501A, this instruction was cited as a mirror of the statute in *Nelson v. Stubblefield*, 2009 Ark. 256, at 3, 308 S.W.3d 586, 588 (affirming the giving of this instruction).

In *Broussard v. St. Edward Mercy Health Sys., Inc.*, the Arkansas Supreme Court held that the provisions in Ark. Code Ann. § 16-114-206(a), which provide that expert testimony may only be given by “a medical care provider of the same specialty as the defendant,” violated the separation-of-powers doctrine, Amendment 80, and the inherent authority of the courts to protect the integrity of proceedings and the rights of litigants. 2012 Ark. 14, at 7. Accordingly, the Committee amended AMI 1501 following *Broussard* to substitute the current generic description for the blank in the first bracketed paragraph—“qualified medical expert”—for the pre-*Broussard*, statute-based description “medical care provider in the same specialty as defendant.” As stated in *Broussard*, the qualifications of experts in medical malpractice cases are governed by Rule 702, Ark. R. Evid. Note that the *Broussard* court explicitly limited its holding by stating that “the rest of the malpractice act, including the remainder of section 16-114-206(a)(1) and (2), is unaffected by this decision.” 2012 Ark. 14, at 8. The court’s Special Task Force proposed a post-*Broussard* amendment to Rule 702, In re Special Task Force on Practice and Procedure in Civil Cases—Final Report, 2014 Ark. 47 (per curiam). The court declined to adopt the proposed rule change in light of “overwhelming” negative responses and the Civil Practice Committee’s recommendation to leave Rule 702 unchanged. In re Special Task Force on Practice and Procedure in Civil Cases—Ark. R. Civ. P. 9, 49, 52, and Ark. R. App. P.—Civ. 8, 2014 Ark. 340 (per curiam).

No medical malpractice action should be considered until counsel has reviewed thoroughly the provisions of the Arkansas Medical Malpractice Act, Ark. Code Ann. §§ 16-114-201 et seq., as well as the Civil Justice Reform Act of 2003, Ark. Code Ann. §§ 16-55-201 et seq. These statutes, and the cases arising thereunder, spell out the theories of li-

ability, identity of potential defendants, venue, periods of limitations, applicable standard of care, and the burden of proof.

The locality rule was specifically approved in *Gambill v. Stroud*, 258 Ark. 766, 769, 531 S.W.2d 945, 948 (1976). This instruction adequately explains the locality rule. *Randolph v. ER Arkansas, P.A.*, 325 Ark. 373, 377–78, 925 S.W.2d 160, 163 (1996). A “similar locality” may be a similar locality in another state as well as in the State of Arkansas. *White v. Mitchell*, 263 Ark. 787, 798–99, 568 S.W.2d 216, 221 (1978). However, the expert must have sufficient relevant knowledge of the locality where the alleged negligence occurred to be able to identify localities that are similar. *Shaffer v. Yang*, 2010 Ark. App. 97, at 3–4. Testimony regarding a national standard of care is insufficient where the expert fails to demonstrate a familiarity with the locality where the alleged malpractice occurred. *Id.* (citing *Wolford v. St. Paul Fire & Marine Ins. Co.*, 331 Ark. 426, 961 S.W.2d 743 (1998)).

In most cases, expert testimony is required to establish the requisite standard of care of a medical care provider. *Robbins v. Johnson*, 367 Ark. 506, 511–12, 241 S.W.3d 747, 751 (2006) (surgical instrument caused spinal cord injury during disc surgery); *Mitchell v. Johnson*, 366 Ark. 592, 597–98, 237 S.W.3d 455, 459 (2006) (failure of internist to follow the recommendations of a specialist regarding blood to be used in transfusions); *Eady v. Lansford*, 351 Ark. 249, 257–59, 92 S.W.3d 57, 62–63 (2002) (physician’s duty to inform patient of rare side effects of medication); *Williamson v. Elrod*, 348 Ark. 307, 311–12, 72 S.W.3d 489, 492–93 (2002) (failure to promptly operate on patient suffering from free air in the abdomen); *Skaggs v. Johnson*, 323 Ark. 320, 324–26, 915 S.W.2d 253, 255–56 (1996) (portion of drain tube left in patient’s leg during surgery); *Robson v. Tinnin*, 322 Ark. 605, 610–12, 911 S.W.2d 246, 248–50 (1995) (changing of dental implants and treatment of fractured teeth); *Reagan v. City of Piggott*, 305 Ark. 77, 80–82, 805 S.W.2d 636, 637–39 (1991) (failure to diagnose appendicitis); *Sexton v. St. Paul Fire & Marine Ins. Co.*, 275 Ark. 361, 362–63, 631 S.W.2d 270, 271–72 (1982) (failure to order restraining vest); *Napier v. Northrum*, 264 Ark. 406, 411–12, 572 S.W.2d 153, 156 (1978) (failure to warn patient of risk of lung puncture during anesthesiology procedure); *Davis v. Kemp*, 252 Ark. 925, 926–27, 481 S.W.2d 712, 712–13 (1972) (whether to irrigate wound and prescribe antibiotics, and failure to find glass in wound); *Nelms v. Martin*, 100 Ark. App. 24, 28–30, 263 S.W.3d 567, 570–72 (2007) (portion of surgical instrument left in knee after surgery). Expert testimony is also required to establish that asserted negligence was a proximate cause of injuries when a patient suffers from a pre-existing condition. *Fryar v. Touchstone Physical Therapy, Inc.*, 365 Ark. 295, 301–02, 229 S.W.3d 7, 12–13 (2006).

However, there is an exception to the general requirement of expert testimony when the asserted negligence lies within a jury’s comprehension as a matter of common knowledge, such as when a surgeon fails to sterilize his instruments or remove a sponge from an incision before closing it. *See Rogers v. Sargent*, 2010 Ark. App. 640, at 5 (citing *Spears*

v. McKinnon, 168 Ark. 357, 270 S.W. 524 (1925)); Haase v. Starnes, 323 Ark. 263, 269, 915 S.W.2d 675, 678 (1996) (citing Lanier v. Trammell, 207 Ark. 372, 180 S.W.2d 818 (1944)). In *Pry v. Jones*, expert testimony was held unnecessary where a physician severed a ureter that he had failed to identify and locate while removing an ovary. 253 Ark. 534, 539-40, 487 S.W.2d 606, 608-09 (1973). The Arkansas Civil Justice Reform Act of 2003 retains this exception to the requirement of expert testimony. Ark. Code Ann. § 16-114-206(a).

The doctrine of *res ipsa loquitur* may apply in appropriate circumstances in medical malpractice cases. Rogers, 2010 Ark. App. 640, at 6; Schmidt v. Gibbs, 305 Ark. 383, 387-91, 807 S.W.2d 928, 931-33 (1991). See also, Taylor v. Riddell, 320 Ark. 394, 402-05, 896 S.W.2d 891, 895-96 (1995); Nelms, 100 Ark. App. at 32-33, 263 S.W.3d at 573-74 (holding that the plaintiff failed to establish one of the essential elements of *res ipsa loquitur* and that the accident that caused the injury was one that, in the ordinary course of things, would not occur if those having control and management of the instrumentality had used proper care where there was expert testimony that the physician had in fact met the standard of care).

The defense of charitable immunity is often raised in medical malpractice cases. The Arkansas Supreme Court has provided eight factors to be considered when determining whether a corporation is entitled to charitable immunity. Masterson v. Stambuck, 321 Ark. 391, 902 S.W.2d 803 (1995). In Progressive Eldercare Servs-Saline, Inc. v. Cauffiel, 2016 Ark. App. 523, 508 S.W.3d 59 (2016), the Arkansas Court of Appeals, in an *en banc* opinion, affirmed the denial of a motion for summary judgment on the defense of charitable immunity. The court held that there were genuine issues of material fact as to whether the facility had abused the charitable form.

A pharmacist owes no duty to customers to warn of risks or dangers associated with medications prescribed by a physician or to refuse to fill legally written prescriptions. Kowalski v. Rose Drugs of Dardanelle, Inc., 2011 Ark. 44, at 14-16.

In 2013, the Arkansas General Assembly (Regular Session) repealed the private cause of action for a violation of residents rights under Ark. Code Ann. § 20-10-1209(a)(1). 2013 Ark. Acts. 1196. A claim for the violation of residents rights must now be brought under the Arkansas Medical Malpractice Act, Ark. Code Ann. § 16-114-201.

For cases involving a claim that the medical care provider failed to obtain any consent to treatment from the patient when consent was required, rather than that the medical care provider failed to provide adequate information, see the Comment to AMI 1506.

Research References

West's Key Number Digest
Health ¶827

AMI 1502

DUTY OF REFERRING PHYSICIAN, SURGEON, OR DENTIST

In referring a patient, a [physician] [surgeon] [dentist] [medical care provider] must use ordinary care to select another [physician] [surgeon] [dentist] [medical care provider] who is competent to [diagnose] [treat] [operate upon] the patient. If the referring [physician] [surgeon] [dentist] [medical care provider] knows or reasonably should know that the [physician] [surgeon] [dentist] [medical care provider] to whom *[he]**[she]* refers the patient is incompetent in some manner and the patient sustains [injuries][or][damages] proximately caused by that particular incompetence, then any failure of the referring [physician] [surgeon] [dentist] [medical care provider] to use ordinary care in the selection of another [physician] [surgeon] [dentist] [medical care provider] would be a proximate cause of the [injuries][or][damages].

NOTE ON USE

This instruction should not be used when a business or other relationship exists between the persons in question, which would provide a basis for imputed negligence or vicarious liability.

COMMENT

A referring physician is not vicariously liable under the doctrine of respondeat superior for the negligence of the physician to whom a patient is referred absent negligence in the selection of the physician to whom the patient is referred. *Norton v. Hefner*, 132 Ark. 18, 198 S.W. 97 (1917).

AMI 1503

IMPUTED CONDUCT

Ordinarily a [physician][surgeon][dentist] [medical care provider] is not responsible for the acts or omissions of _____ when not employed by the

(See Note on Use)

[physician][surgeon][dentist] [medical care provider]. However, _____ may become the agent of the

(See Note on Use)

[physician][surgeon][dentist] [medical care provider] if [he][she] is acting under the direct supervision and control of the [physician][surgeon][dentist] [medical care provider].

NOTE ON USE

Insert "a nurse," "an orderly," "a technician," etc. If the defendant physician, surgeon or dentist is alleged to be responsible for the acts of a physician, surgeon or dentist acting under his or her direct supervision and control, insert "another physician," "another surgeon," or "another dentist".

If the medical care provider is admitted to be an employee of the defendant employer, and the defendant employer is a business entity, use AMI 208.

When this instruction is used, AMI 207 and 701 should also be used.

If the patient is referred to another physician, surgeon, dentist or medical care provider not under the direct supervision and control of the defendant, use AMI 1505.

If the action is based on an individual medical care provider's improper delegation of authority to or failure to properly instruct another person, use AMI 1501.

If the medical care provider is an institution, some pronouns must be modified.

In cases with claims accruing on or after March 25, 2003, when a medical care provider is a codefendant with a medical care facility, and the only reason for naming the facility as a defendant is that the

defendant medical care provider practices in the facility, the plaintiff has the burden of proving that the defendant medical care provider is the employee of the facility before the facility may be held liable for the medical care provider's negligence. Ark. Code Ann. § 16-114-210. In this situation, this instruction should not be used, and AMI 207 and 701 should be used.

COMMENT

A physician may be found to be an agent of a for-profit clinic or hospital where he practices. *Medi-Stat, Inc. v. Kusturin*, 303 Ark. 45, 792 S.W.2d 869, *aff'd on reh'g* 303 Ark. 45, 798 S.W.2d 438 (1990). If the medical care provider is an employee of the defendant employer, then the defendant employer is vicariously liable under the doctrine of respondeat superior for the negligence of the medical care provider. *Chicago, R.I. and P. R. Co. v. Britt*, 189 Ark. 571, 74 S.W.2d 398 (1934). A charitable or non-profit employer is not vicariously liable for the negligence of a physician working there. *Thomas v. Sessions*, 307 Ark. 203, 818 S.W.2d 940 (1991); *Arkansas Midland R. Co. v. Pearson*, 98 Ark. 399, 135 S.W. 917 (1908).

The doctrine of respondeat superior does not apply between physicians who are not themselves x-ray specialists and x-ray specialists they employ to assist them in the diagnosis and treatment of diseases. *Runyan v. Goodrum*, 147 Ark. 481, 228 S.W. 397 (1921). However, the doctrine does apply between physicians who are x-ray specialists and x-ray technicians they employ to assist them. *Gray v. McLaughlin*, 207 Ark. 191, 179 S.W.2d 686 (1944).

AMI 1504

DUTY OF HOSPITAL, SANITARIUM, OR NURSING HOME

A [hospital] [sanitarium] [nursing home] must use ordinary care [to determine the mental and physical condition of a patient] [and] [to furnish a patient the care and attention reasonably required by [his][her] mental and physical condition] [and] [to follow the orders and directions of the patient's attending physician].

NOTE ON USE

This instruction rather than AMI 1501 should be used when the claim does not involve a medical injury as defined in the Medical Malpractice Act, Ark. Code Ann. § 16-114-201(3).

This instruction should not be used when the hospital, nursing home, or medical care facility agrees to provide special care or attention.

COMMENT

This instruction is appropriate, and AMI 1501 is not appropriate, when the issue is whether a patient was properly supervised by the staff of a nursing home when he left the nursing home unnoticed, as such a claim does not involve a medical injury as defined in the Medical Malpractice Act. *Bailey v. Rose Care Ctr*, 307 Ark. 14, 19, 817 S.W.2d 412, 415 (1991).

Arkansas's Medical Malpractice Act, Ark. Code Ann. §§ 16-114-201 to 212 does not confer a cause of action for negligent credentialing. *Paulino v. QHG of Springdale, Inc.*, 2012 Ark. 55, at 10.

The defense of charitable immunity is often raised in cases brought against hospitals, sanitariums, and nursing homes. The Arkansas Supreme Court has provided eight factors to be considered when determining whether a corporation is entitled to charitable immunity. *Masterson v. Stambuck*, 321 Ark. 391, 902 S.W.2d 803 (1995). In *Progressive Eldercare Servs-Saline, Inc. v. Cauffiel*, 2016 Ark. App. 523, 508 S.W.3d 59 (2016), the Arkansas Court of Appeals, in an *en banc* opinion, affirmed the denial of a motion for summary judgment on the defense of charitable immunity. The Court held that there were genuine issues of material fact as to whether the facility had abused the charitable form.

Research References

West's Key Number Digest
Health ⚙ 827

AMI 1505

DUTY TO PREVENT SPREAD OF CONTAGIOUS DISEASE

A physician who attends a patient afflicted with a contagious disease must use ordinary care [to prevent the spread of the disease] [and] [to warn persons who are likely to come in contact with the patient].

COMMENT

These duties were enunciated in *Davis v. Rodman*, 147 Ark. 385, 227 S.W. 612 (1921).

Research References

West's Key Number Digest

Health ⚙827

AMI 1506

**ISSUES—CLAIM FOR DAMAGES BASED ON
MEDICAL INJURY—INFORMED CONSENT—
BURDEN OF PROOF**

 claims damages from and *[has]*
(Plaintiff) (defendant)
[have] the burden of proving each of three essential
propositions:

First, that *[he][she]* has sustained damages;

Second, that *[and* , *or one of*
them,] failed to supply adequate information to obtain
an informed consent to the *[treatment] [procedure]*
[surgery];

Third, that such failure was a proximate cause of
damages.
(plaintiff's)

[If you find from the evidence in this case that
each of these propositions has been proved, then
your verdict should be for (against the party or
(plaintiff)
parties found to be liable); but if, on the other hand,
you find from the evidence that any of these proposi-
tions has not been proved, then your verdict should
be for .]
(defendant)

NOTE ON USE

This instruction should be used, rather than AMI 203, when the
only issue submitted to the jury is that of lack of informed consent.

When there is no issue of informed consent submitted, AMI 1501
should be used.

Where informed consent is submitted in conjunction with any other
bases of liability, use AMI 1507.

When this instruction is used, also use AMI 1508 and 1509.

Do not use the final bracketed paragraph when the case is submitted on interrogatories, or where affirmative defenses are in issue.

If the plaintiff claims that the medical care provider failed to obtain any consent to treatment from the patient when consent was required, rather than that the medical care provider failed to provide adequate information, this instruction should be modified accordingly.

COMMENT

This instruction is based on Ark. Code Ann. § 16-114-206(b)(1), a provision of the Arkansas Medical Malpractice Act that pertains specifically to informed consent claims. It embraces the concept that failure to supply adequate information to obtain an informed consent is a distinct basis of liability from that of negligence. See *Aronson v. Harriman*, 321 Ark. 359, 901 S.W.2d 832 (1995) (affirming a verdict in favor of the defendant physician on negligence claim but in favor of the plaintiff and awarding damages on the claim of lack of informed consent); *Brumley v. Naples*, 320 Ark. 310, 896 S.W.2d 860 (1995) (breach of express warranty is a distinct basis of liability from that of negligence).

The Arkansas Supreme Court has distinguished cases involving the complete absence of consent from those based on the medical care provider's failure to provide adequate information. The court ruled that it was error to give AMI 1508 and 1509—"instructions regarding informed consent"—when the plaintiff's claim was not that the physician had failed to supply adequate information but instead that he had performed the procedure "without any consent" by the patient or someone on the patient's behalf. *Millsap v. Williams*, 2014 Ark. 469 at 14. The court noted that there "was no model instruction regarding consent to treatment, and the instructions related to informed consent were not applicable" to such a case. *Id.* The trial court in *Millsap* gave a modified version of AMI 1507, stating that plaintiff had asserted the medical care provider's negligence and failure to obtain "proper consent" to treatment as grounds for recovery; but the trial court rejected plaintiff's proffered non-model instruction based on Ark. Code Ann. §§ 20-9-601 to -603 (Repl. 2014) ("Consent to treatment," defining who may consent, when consent may be implied from the circumstances, and when courts may give consent). The Arkansas Supreme Court observed that "there were no further instructions given that explained when a doctor must obtain consent, how consent may be given, or who may give consent." 2104 Ark. 469 at 13. Instead, the trial court gave AMI 1508 and 1509. The Arkansas Supreme Court concluded that AMI 1508 and 1509 were inapplicable and confusing, noted that non-model instructions may be given when there are no applicable instructions, and further noted that "this court has held that it is error for the circuit court to fail to instruct the jury on a statute applicable to the case." 2014 Ark. 469 at 14-15, *cit-*

ing *Allstate Ins. Co. v. Dodson*, 2011 Ark. 19, 376 S.W.3d 414. The court did not, however, specify the elements of a no-consent claim or the legal theory on which it is based, nor did the court explicitly approve the plaintiff's proffered instructions. Further, the Millsap court did not discuss the traditional view, still followed in a number of other jurisdictions but not previously addressed by the Arkansas court, that performance of non-emergency surgical procedures without the patient's consent constitutes a battery. For a collection of such cases from other jurisdictions, see *Consent as Condition of Right to Perform Surgical Procedures*, 139 A.L.R. 1370 (2014 Cum. Supp.). Given the likelihood that no-consent cases are infrequent and the absence of specific guidance in Arkansas law, the Committee has not drafted model instructions for such cases.

Research References

West's Key Number Digest
Health ¶923

AMI 1507

**ISSUES—CLAIM FOR DAMAGES BASED ON
INFORMED CONSENT—NEGLIGENCE—BURDEN
OF PROOF**

(Plaintiff) asserts two separate grounds for recovery of damages: First, that there was negligence on the part of _____ [and _____, or one of them]; and, second, that _____ [and _____, or one of them,] failed to supply adequate information to obtain an informed consent to the [treatment] [procedure] [surgery].

With respect to the claim of negligence, (plaintiff) [has] [have] the burden of proving each of three essential propositions:

First, that [he]/[she] sustained damages;

Second, that _____ [and _____, or one of them,] was negligent;

Third, that such negligence was a proximate cause of plaintiff's damages.

With respect to the asserted failure to supply adequate information to obtain an informed consent, plaintiff has the burden of proving each of three essential propositions:

First, that [he]/[she] sustained damages;

Second, that _____ [and _____, or one of them,] failed to supply adequate information to obtain an informed consent to the [treatment] [procedure] [surgery];

And third, that such failure was a proximate cause of _____ damages.
(plaintiff's)

[It will be necessary for you to consider separately each asserted ground for recovery. If you find from the evidence that every essential proposition with respect to any one ground for recovery has been proved, then your verdict should be for _____ (and
(plaintiff)
against the party or parties against whom that ground for recovery is asserted); but if you find from the evidence that any essential proposition with respect to any one ground for recovery has not been proved, then your verdict with respect to that ground for recovery should be for _____.]
(defendant)

NOTE ON USE

This instruction should be used where both negligence and failure to obtain an informed consent are submitted.

Do not use the final bracketed paragraph if the case is submitted on interrogatories, or where affirmative defenses are in issue.

This instruction may be modified and used where other or additional grounds of recovery are asserted, such as battery or breach of express warranty.

When this instruction is submitted, AMI 1501, 1508 and 1509 should also be given, except, however, when the patient claims that the medical care provider failed to obtain any consent to treatment from the patient when consent was required, rather than that the medical care provider failed to provide adequate information. In such cases, AMI 1508 and 1509 should not be given.

COMMENT

See Comment to AMI 1506.

Research References

West's Key Number Digest
Health ⇨923

AMI 1508

DUTY TO OBTAIN INFORMED CONSENT

In obtaining consent to perform *[treatment] [procedure] [surgery]*, a *[physician] [surgeon] [dentist] [medical care provider]* is under a duty to supply adequate information to enable the *[person authorized to give consent for the]* patient to make a reasoned and intelligent decision to give or withhold consent.

Other than in an emergency situation, the information required is that type as would customarily have been given at the time of treatment to *[a person authorized to give consent for]* a patient in a similar situation by other *[physicians] [surgeons] [medical care providers]* with similar training and experience practicing in the locality in which *[he][she]* practices or in a similar locality.

[In deciding whether adequate information was supplied, you may consider whether it was reasonable for _____ to limit such disclosure because it
(defendant)
could be expected to adversely and substantially affect _____ condition.]
(patient's)]

NOTE ON USE

This instruction should be given when a question is submitted as to whether adequate information was supplied by the medical care provider in connection with the granting or withholding of consent to treatment.

Select the bracketed description of the medical care provider appropriate to the defendant. For medical care providers other than those specifically named herein, insert the type of practitioner from the categories specified in Ark. Code Ann. § 16-114-201(2).

If the consent in issue was given by someone authorized to act upon behalf of a patient, e.g., parent on behalf of a minor, the bracketed phrase preceding "patient" should be used.

The last paragraph should be given only if there is substantial evidence that disclosure was limited because of its anticipated effect upon the patient's condition.

This instruction should not be given when the plaintiff claims that the medical care provider failed to obtain any consent to treatment from the patient when consent was required, rather than that the medical care provider failed to provide adequate information. Instead, an appropriate non-model instruction should be given.

COMMENT

This instruction is based upon the substantive rule set forth in Ark. Code Ann. § 16-114-206(b). An instruction based upon that statute was given implicit approval by the Supreme Court in *Aronson v. Harriman*, 321 Ark. 359, 901 S.W.2d 832 (1995).

Arkansas has adopted the position that the necessity for and scope of information to be given in connection with the decisions to give or withhold consent is a medical determination. *Fuller v. Starnes*, 268 Ark. 476, 597 S.W.2d 88 (1980). Consequently, this is a matter which, in most instances, must be established by expert testimony. *Eady v. Lansford*, 351 Ark. 249, 92 S.W.3d 57 (2002); *Parkerson v. Arthur*, 83 Ark. App. 240, 125 S.W.2d 825 (2003); *Fuller, supra*. The Supreme Court held in *Eady, supra*, that the requirement for expert testimony in an informed consent case is constitutional.

Some of the factors set forth in Ark. Code Ann. § 16-114-206(b)(2) are relevant to proximate cause, rather than duty owed. These are treated in AMI 1509.

The Arkansas Supreme Court in *Millsap v. Williams*, 2014 Ark. 469, ruled that it is an abuse of discretion to give this instruction when the plaintiff claims that the medical care provider failed to obtain any consent to treatment from the patient when consent was required, rather than that the medical care provider failed to provide adequate information. For discussion of *Millsap*, see the Comment to AMI 1506.

Research References

West's Key Number Digest
Health ¶923

AMI 1509

PROXIMATE CAUSE—INFORMED CONSENT

In determining whether the failure to obtain an informed consent was a proximate cause of any damages sustained by , you may consider the following factors:

(a) Whether

(plaintiff/person giving consent on behalf of plaintiff)

knew, or whether a person of ordinary intelligence and of awareness in a position similar to that of could reasonably be expected to know, of the risks or hazards inherent in such *[treatment]* *[procedure]* *[surgery]*;

(b) Whether would have undergone *[treatment]* *[procedure]* *[surgery]*, regardless of the risks involved, or whether *[he]**[she]* did not wish to be informed thereof.

 NOTE ON USE

This instruction should be given in addition to AMI 501 when a question is submitted as to whether adequate information was supplied by the medical care provider in connection with the granting or withholding of consent to treatment.

This instruction should not be given when the plaintiff claims that the medical care provider failed to obtain any consent to treatment from the patient when consent was required, rather than that the medical care provider failed to provide adequate information. Instead, an appropriate non-model instruction should be given.

COMMENT

This instruction enumerates the proximate cause factors set forth in Ark. Code Ann. § 16-114-206(b)(2)(A), (B), and (C). Although the statute appears to list these factors in the context of the duty owed, it is clear that they are relevant to the causation issue. The factor contained

in Ark. Code Ann. § 16-114-206(b)(2)(D) relates to the duty owed and is contained in AMI 1508. A plaintiff does not necessarily have the burden of proving that he or she would not have consented to the procedure had the medical provider adequately informed him or her of its risks. The test is the objective one of "whether a reasonable prudent patient would not have consented to the surgery." *Aronson v. Harriman*, 321 Ark. 359, 901 S.W.2d 832 (1995).

The Arkansas Supreme Court in *Millsap v. Williams*, 2014 Ark. 469, ruled that it is an abuse of discretion to give this instruction when the plaintiff claims that the medical care provider failed to obtain any consent to treatment from the patient when consent was required, rather than that the medical care provider failed to provide adequate information. For discussion of *Millsap*, see the Comment to AMI 1506.

Research References

West's Key Number Digest
Health ⅈ923

AMI 1510

DUTY OF ATTORNEY—NEGLIGENCE

In performing legal services for a client, an attorney must possess and use with reasonable diligence the skill ordinarily used by attorneys acting in the same or similar circumstances. A failure to meet this standard is negligence.

[In deciding the degree of diligence and skill the law required of _____ (and) (in deciding whether
(defendant) used the degree of diligence and skill the law
(defendant) required of *[him][her]*), you may consider only the evidence presented by expert witnesses (and) *(evidence of professional standards presented in the trial)*. In considering the evidence on any other issue in this case, you are not required to set aside your common knowledge, but you have a right to consider that evidence in light of your own observations and experiences in the affairs of life.]

NOTE ON USE

The bracketed paragraph must be given unless the court determines that expert testimony is not necessary because the case falls within the common knowledge exception. The bracketed paragraph of this instruction should be used only when expert testimony is required to establish the requisite degree of skill and diligence. If it is used, do not use AMI 104. The first parenthetical phrase regarding use or application of the standard of care should be used when the trial judge determines that only expert testimony or other admissible evidence of professional standards should be considered by the jury on the issue of the use or application of the standard of care.

When the bracketed paragraph is given, AMI 107 should also be submitted.

Additional instructions may be required in an attorney negligence case. For example, if there is an issue whether there was an attorney-client relationship, that issue would need to be presented by an ap-

appropriate modification of AMI 203 as well as a definition of what is required to establish its existence.

COMMENT

In an action against an attorney for professional negligence, testimony of other attorneys in the same area as to standards of conduct has been held proper and permissible. An attorney is negligent if he or she fails to exercise reasonable diligence and skill on behalf of a client. A plaintiff must prove that the attorney's conduct fell below the generally accepted standard of practice and that this conduct proximately caused damages. To show damages and proximate cause, the plaintiff must show that, but for the alleged negligence of the attorney, the result in the underlying action would have been different. *Barnes v. Everett*, 351 Ark. 479, 486, 95 S.W.3d 740, 744 (2003) (lawyer advised client to settle with active tortfeasor, causing dismissal with prejudice of claim against passive tortfeasor); *Pugh v. Griggs*, 327 Ark. 577, 585-86, 940 S.W.2d 445, 449 (1997) (lawyer did not pursue suit and client suffered a nonsuit, which resulted in an untimely refile under the savings statute); *Callahan v. Clark*, 321 Ark. 376, 387-88, 901 S.W.2d 842, 848 (1995) (lawyer negligently advised client to sign property settlement agreement).

In *Barnes*, the Arkansas Supreme Court said that this instruction (formerly AMI 1512) properly told the jury that an attorney's conduct must be measured against the generally accepted standard of practice and that expert testimony is required as proof on what the standard of practice is unless the trial court determines that such testimony is not necessary because the case falls within the common knowledge exception. 351 Ark. at 493-94, 95 S.W.3d at 749.

An attorney is not a guarantor that his or her judgment is infallible and is not liable to a client for errors of judgment made in good faith. Attorneys are not liable for a mistaken opinion on a point of law that has not been settled by a court of highest jurisdiction and on which reasonable attorneys may differ. *Schmidt v. Pearson, Evans & Chadwick*, 326 Ark. 499, 506-07, 931 S.W.2d 774, 779-80 (1996) (basis for client's claim against lawyer was a matter of first impression).

An attorney may be sued under the theory of breach of an implied contract. *Lemon v. Laws*, 313 Ark. 11, 15, 852 S.W.2d 127, 130 (1993); *Pettus v. McDonald*, 343 Ark. 507, 512, 36 S.W.3d 745, 748 (2001). As a result joinder of negligence and contract claims in a legal malpractice case has been allowed. *Lemon*, 313 Ark. at 15, 825 S.W.2d at 130. For statute of limitation purposes, most actions will be characterized as sounding in tort. *Sturgis v. Skokos*, 335 Ark. 41, 49-50, 977 S.W.2d 217, 221 (1998).

A violation of the Model Rules of Professional Conduct is not evidence of negligence and does not create any presumption that a legal

duty has been breached. *Orsini v. Larry Moyer Trucking, Inc.*, 310 Ark. 179, 184, 833 S.W.2d 366, 369. The Arkansas Rules of Professional Conduct provide that, “[a] [v]iolation of a rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. . . . They are not designed to be a basis for civil liability.” Ark. R. of Prof’l Conduct Scope ¶ 20.

Proximate cause in attorney malpractice cases will, in some instances, present a question of law. In *Sturgis*, the court held the proximate causation question of whether an appeal, which the defendant failed to perfect, would have been successful is a question of law. 335 Ark. at 51, 977 S.W.2d at 221–22.

Under Arkansas law, the reach of the comparative fault doctrine in legal malpractice cases is not limited to situations in which the client has taken some specific action to interfere with the attorney’s performance. *Reliance Nat’l Indem. Co. v. Jennings*, 189 F.3d 689, 693–94 (8th Cir. 1999). In *Delanno, Inc. v. Peace*, the court held that the client failed to exercise reasonable diligence by not investigating further after she had authoritative notice that the corporate attorney’s representation to her was different from the representation made to her by a state governmental entity. 366 Ark. 542, 547–49, 237 S.W.3d 81, 86–87 (2006).

The plain language of Ark. Code Ann. § 16-22-310(a) requires a plaintiff to have direct privity of contract with the person, partnership, or corporation he or she is suing for legal malpractice. *Giles v. Harrington, Miller, Neihouse & Krug*, 362 Ark. 338, 347, 208 S.W.3d 197, 203 (2005); *McDonald v. Pettus*, 337 Ark. 265, 271–72, 988 S.W.2d 9, 12 (1999). Section 16-22-310 enunciates the parameters for litigation by clients against attorneys. *Clark v. Ridgway*, 323 Ark. 378, 385–86, 914 S.W.2d 745, 748–49 (1996). Ark. Code Ann. §§ 16-22-310 and 16-114-303, statutes that provide immunity from claims brought by parties not in direct privity of contract with attorneys, only provide immunity from claims based upon conduct in connection with professional services by the attorney. An attorney’s alleged negligent hiring, retention, and supervision of another attorney do not fall within the parameters of professional services. *Madden v. Aldrich*, 346 Ark. 405, 411–14, 58 S.W.3d 342, 347–49 (2001).

The court in *Bomar v. Moser* explained that a client does not have an unqualified right to rely upon a representation made by his or her attorney when the client receives information from an authoritative source that directly contradicts the representations of the attorney. 369 Ark. 123, 131–33 251 S.W.3d 234, 241–43 (2007). Instead, it is incumbent upon the client to reconcile the contradiction by some act of reasonable diligence. *Id.* See also, *Delanno, Inc.*, *supra*. 366 Ark. at 547–49, 237 S.W.3d at 86–87.

The bracketed paragraph of this instruction includes the concept of

common knowledge as it is to be applied to legal negligence cases. The bracketed paragraph has been modified to recognize the distinction between deciding the applicable standard of care and deciding whether the attorney used or applied the applicable standard of care. In some cases, the only relevant proof concerning the application or use of the appropriate standard of care will come from expert witnesses and other admissible evidence of professional standards. However, in other cases, the trial judge may determine that the jury should consider appropriate lay testimony that is relevant to the use or application of the standard of care. See George L. Blum, Annotation, *Admissibility and Necessity of Expert Evidence as to Standards of Practice and Negligence in Malpractice Action Against Attorney-Conduct Related to Procedural Issues*, 59 A.L.R.6th 1, § 5 (2010).

Research References

West's Key Number Digest
 Attorney and Client ¶129(3)

Legal Encyclopedias
 C.J.S., Attorney and Client §§ 385 to 386, 396 to 400

AMI 1511

**FACTORS—PROXIMATE CAUSE—ATTORNEY
NEGLIGENCE**

I have instructed you on proximate cause and the burden of proof. In deciding the issue of proximate cause in this case, there are a number of factors you must consider.

First, whether _____ would have prevailed in a
(plaintiff)
case against _____; and
(putative defendant)

Second, the amount of damages that would have been awarded in that case, had it been tried, or the probable amount that would have been paid in a settlement; and

Third, to what extent a judgment against _____
(putative
defendant) _____ would have been collectable.

In considering these questions, you should consider the instructions of law that would have been given in a suit against _____.
(putative defendant)

These are as follows:

[Give appropriate instructions.]

NOTE ON USE

Give this instruction immediately following AMI 501.

This is an instruction that should be given in a case where the defendant failed to timely file a case on behalf of the plaintiff. This instruction assumes that the previous attorney-client relationship between plaintiff and defendant is established by admission or uncontroverted evidence.

This instruction should be modified to fit other situations out of which the claimed attorney negligence arises.

COMMENT

To prove damages and proximate cause in an attorney negligence case, a plaintiff must show, but for the alleged negligence of the attorney, the result in the underlying action would have been different. In this respect, a plaintiff must prove the merits of the underlying case as part of the proof of the malpractice case. *Barnes v. Everett*, 351 Ark. 479, 95 S.W.3d 740 (2003) (lawyer advised client to settle with active tortfeasor causing dismissal with prejudice of claim against passive tortfeasor).

In the case of a failure to perfect an appeal, whether the appeal would have been successful is a question of law, but the consequences of a successful appeal may present factual proximate cause issues. *Sturgis v. Skokos*, 335 Ark. 41, 977 S.W.2d 217 (1998).

This instruction is intended to present the "case within a case" requirement in an understandable manner. For purposes of illustration, as well as simplicity, it is drafted for a case where the plaintiff's former attorney failed to file plaintiff's case within the statute of limitations period.

The circumstances out of which claims of attorney malpractice arise are numerous, and the factors relevant to proximate cause are so varied that a general instruction applicable to all is impracticable. Counsel, therefore, will often be required to fashion an appropriate instruction to focus the jury's attention upon the proximate cause factors relevant to each case.

In giving the jury the instructions that would have been applicable, had the previous case been filed, grammatical modifications may be necessary in order to make them intelligible. The instructions may be abbreviated, since the jury will be instructed on basic concepts by other instructions.

See Annotation, "Measure and Elements of Damages Recoverable for Attorney's Negligence in Preparing or Conducting Litigation—Twentieth Century Cases," 90 A.L.R.4th 1033 (1991).

Research References

West's Key Number Digest
Attorney and Client ¶129(3)
Legal Encyclopedias
C.J.S., Attorney and Client §§ 385 to 386, 396 to 400

AMI 1512

**ISSUES—CLAIM FOR DAMAGES BASED UPON
BREACH OF FIDUCIARY DUTY**

 claims damages from for breach of
(Plaintiff) (defendant)
fiduciary duty and has the burden of proving each of
three essential propositions:

First: That *[he][she]* has sustained damages;

**Second: That breached the fiduciary duty
(defendant)
[he][she][it] owed to *[as I will explain it to you];*
(plaintiff)**

**Third: That the breach of fiduciary duty by
(defendant)
was a proximate cause of 's damages.
(plaintiff)**

**[If you find from the evidence in this case that
each of these propositions has been proved, then
your verdict should be for ; but if, on the other
(plaintiff)
hand, you find from the evidence that any of these
propositions has not been proved, then your verdict
should be for].
(defendant)**

NOTE ON USE

Do not use the final bracketed paragraph when the case is submitted on interrogatories.

Use this instruction in conjunction with AMI 1513. If the existence of the underlying relationship itself is disputed, the instructions on this subject may need to be modified or supplemented.

COMMENT

The determination of the existence of a fiduciary duty in a particular relationship is a matter of law, and it is error to submit that issue to

the jury. *Long v. Lampton*, 324 Ark. 511, 922 S.W.2d 692 (1996) (error to instruct jury that minority shareholders had burden to prove president of corporation owed them a fiduciary duty because that was a question of law). Where there is a factual dispute as to the existence of the relationship giving rise to the duty at the time of the occurrence, as indicated in the Note on Use, the instructions on this subject may need to be supplemented or modified.

Bomar v. Moser, 369 Ark. 123, 251 S.W.3d 234 (2007), held that a client does not have an unqualified right to rely upon the representation of his or her attorney when the client receives information from an authoritative source which directly contradicts the representations of the attorney. Instead, it is incumbent upon the client to reconcile the contradiction by some act of reasonable diligence. *Id.* See also, *Delanno, Inc., v. Peace*, 366 Ark. 542, 237 S.W.3d 81 (2006).

Damages for emotional distress without any accompanying economic loss are not recoverable in a breach of fiduciary duty action. *Rees v. Smith*, 2009 Ark. 169, 301 S.W.3d 467.

Research References

West's Key Number Digest

Attorney and Client ◊129(3); Principal and Agent ◊79(8); Trusts ◊263

Legal Encyclopedias

C.J.S., Agency §§ 303, 602; Attorney and Client §§ 385 to 386, 396 to 400; Trusts §§ 579 to 580, 589, 602

AMI 1513

FIDUCIARY DUTY—DEFINITION—RELATIONSHIP
UNDISPUTED

At the time of the *(occurrence) (transaction)*,
 _____ was the _____ of _____.
 (defendant) (describe) (describe)

A fiduciary relationship exists between a _____
 and a _____.

[Here insert a description of the duty].

[The existence or performance of an agreement between the parties does not prevent the existence of the fiduciary duty which arises from the relationship itself.]

[Self-dealing by a fiduciary *(without consent)* is always a violation of the duty, even if innocent and unintentional.]

NOTE ON USE

In the first paragraph, describe the particular legal relationship giving rise to the duty, e.g., principal and agent, attorney and client, officer and corporation, executor or trustee and beneficiary. If the existence of the underlying relationship itself is disputed, the instructions on this subject may need to be modified or supplemented.

In the second paragraph, describe the duty in the context of the particular relationship and the misconduct alleged. For example, if an agent is alleged to have had an undisclosed conflict of interest with his principal, the first two paragraphs might read:

At the time of the transaction, _____ was the agent of _____, the
 (defendant) (plaintiff)
 principal. A fiduciary relationship exists between a principal and agent.

The fiduciary relationship imposes a duty on the agent that the agent, within the limits of the agency, deal fairly and honestly with its principal and imposes the responsibility to disclose any conflicts between the agent's interests

and the principal's interests that might make the agent act in its own best interests at the expense or to the detriment of the principal.

Use the additional bracketed paragraphs if warranted by the evidence. Use the parenthetical in the final bracketed paragraph if the existence of consent is an issue.

COMMENT

The determination of the existence of a fiduciary duty in a particular relationship is a matter of law, and it is error to submit that issue to the jury. *Sexton Law Firm, P.A. v. Milligan*, 329 Ark. 285, 948 S.W.2d 388 (1997); *Long v. Lampton*, 324 Ark. 511, 922 S.W.2d 692 (1996). Where there is a factual dispute as to the existence of the relationship giving rise to the duty at the time of the occurrence, as indicated in the Note on Use, the instructions on this subject may need to be modified or supplemented.

The sample instruction in the Note on Use is modeled after O'MALLEY, GRENIG AND LEE, *FEDERAL JURY PRACTICE & INSTRUCTIONS* § 123.31 (2000). See also *Yahraus v. Continental Oil Co.*, 218 Ark. 872, 239 S.W.2d 594 (1951).

For discussions of fiduciary duty in other contexts, see *Woches v. Woolverton*, 2010 Ark. App. 802 (escrow agreement); *Taylor v. Hinkle*, 360 Ark. 121, 200 S.W.3d 387 (2004) (shareholders in closely held corporation); *Cole v. Laws*, 349 Ark. 177, 76 S.W.3d 878 (2002) (attorney and client); *Pennington v. Harvest Foods, Inc.*, 326 Ark. 704, 934 S.W.2d 485 (1996) (manager of business); *Hosey v. Burgess*, 319 Ark. 183, 890 S.W.2d 262 (1995) (trustee and beneficiary); *Texas Oil & Gas Corp. v. Hawkins Oil & Gas, Inc.*, 282 Ark. 268, 668 S.W.2d 16 (1984) (joint venturers); *Raines v. Toney*, 228 Ark. 1170, 313 S.W.2d 802 (1958) (officer/director of corporation, corporate opportunity); and *Employers Ins. of Wausau v. Didion Mid-South Corp.*, 65 Ark. App. 201, 987 S.W.2d 745 (1999) (assigned risk insurer and insured).

The existence of a written contract does not preclude the existence of a fiduciary duty. *Employers Ins. of Wausau*, *supra*.

Self-dealing without consent is always a violation of fiduciary duty, even if innocent and unintentional. *Hosey v. Burgess*, *supra*.

Research References

West's Key Number Digest
 Attorney and Client ⇨129(3); Principal and Agent ⇨79(8); Trusts ⇨263

Legal Encyclopedias
 C.J.S., Agency §§ 303, 602; Attorney and Client §§ 385 to 386, 396 to 400; Trusts §§ 579 to 580, 589, 602

CHAPTER 16

ANIMALS

Table of Instructions

AMI

- 1601. Animals—Duty of Owner or Custodian.
- 1602. Liability for Dangerous Animals.
- 1603. Liability for Dangerous Animals—Defenses.
- 1604. Liability for Dangerous Animals—Comparative Fault.

AMI 1601

ANIMALS—DUTY OF OWNER OR CUSTODIAN

[An owner] [A person having custody] of _____
(Description)

has a duty to use ordinary care of animals, i.e., "cattle," "hogs," etc.) to keep (his) (her) animals from running at large when (he) (she) knows or reasonably should know that such animals are likely to cause injury or damage to others.

NOTE ON USE

This instruction should be used when negligence is predicated upon the violation of the common law duty to use ordinary care. If an applicable statute imposes absolute liability, usually only the issue of damages will be submitted to the jury. If an applicable statute imposes a duty, the violation of which is only evidence of negligence, AMI 601 should be used.

COMMENT

This instruction was cited with approval in *Bolstad v. Pergeson*,

806 S.W.2d 377 (1991). In that case, a dog, while chasing a squirrel, ran into a vehicle leaving a dent in the door. The court found that while the dog had shown no prior propensity to crash into cars, the dog owners should have known that a dog running at large and chasing squirrels raised a reasonable likelihood of injury of some sort.

In *Sanders v. Mincey*, 317 Ark. 398, 879 S.W.2d 398 (1994), this instruction was properly given where guinea hens were allowed to run at large causing an automobile accident after the hens entered the highway. Citing *Bolstad, supra*, the court found that allowing the hens to run at large raised a reasonable likelihood of injury.

The English common law required an owner of domestic animals, such as cattle, to keep them off the land of other persons, whether it was fenced or not, and the failure to do so was an actionable trespass (absolute liability). This rule has not been adopted in Arkansas. *St. Louis, I. M. & S. Ry. Co. v. Newman*, 94 Ark. 458, 127 S.W. 735 (1910); *Little Rock & F.S.R. Co. v. Finley*, 37 Ark. 562 (1881). However, the negligence theory of liability is available. *Finley v. Glover*, 229 Ark. 368, 315 S.W.2d 928 (1958). Logically a custodian of such animals other than the owner can be liable under the negligence theory. See *Fraser v. Hawkins*, 137 Ark. 214, 208 S.W. 296 (1919).

Ark. Code Ann. § 5-62-122 prohibits the owner of certain animals from allowing them to run at large. See *Prickett v. Farrell*, 248 Ark. 996, 455 S.W.2d 74 (1970). A violation of this statute is evidence of negligence. *Rogers v. Stillman*, 223 Ark. 779, 268 S.W.2d 614 (1954).

Ark. Code Ann. § 2-38-301 provides for the adoption of local acts prohibiting the running of certain named animals at large (absolute liability for damage to crops on the trespass theory).

Research References

West's Key Number Digest
Animals ⇨55, 74(7)

Legal Encyclopedias
C.J.S., Animals §§ 346, 394

AMI 1602

LIABILITY FOR DANGEROUS ANIMALS

A person who keeps [a wild animal] [a domestic animal with knowledge of its dangerous tendencies] [_____] does so at (his) (her) own risk and is
other dangerous animal
liable for [injuries] [and] [damage] caused by the animal [but the injured person's right to recover damages may be diminished or barred by (his) (her) own fault].

NOTE ON USE

Do not use this instruction when the case is submitted on interrogatories or when the plaintiff is a trespasser as a matter of law. If there is an issue of fact as to whether the plaintiff is a trespasser, licensee, or invitee, this instruction should be appropriately modified.

If there is an issue as to the plaintiff's negligence or other fault, such as proof that the plaintiff teased or provoked the animal, also use AMI 1603 and 1604.

COMMENT

The owner or custodian of a dangerous animal is strictly liable for harm done by it to a third person. *Strange v. Stovall*, 261 Ark. 53, 546 S.W.2d 421 (1977); Note, 24 Ark.L.Rev. 593 (1971). It is immaterial that the animal is not savage but acts in good nature and playfulness if its owner has notice of a propensity to injure people. *Finley v. Smith*, 240 Ark. 323, 399 S.W.2d 271 (1966). Despite the rule of strict liability, the plaintiff's recovery may still be diminished by the statutory doctrine of comparative fault. Ark. Code Ann. § 16-64-122; *Strange v. Stovall*, *supra*.

A tenant's failure to prohibit a vicious dog from running at large in violation of a city ordinance not imputed to landlord. *Bryant v. Putnam*, 322 Ark. 284, 908 S.W.2d 338 (1995).

Research References

West's Key Number Digest
Animals ☞74(7)

Legal Encyclopedias
C.J.S., Animals §§ 340 to 342, 394

AMI 1603

LIABILITY FOR DANGEROUS
ANIMALS—DEFENSES

 contend(s) that was at fault which
(Defendant) (plaintiff)
was a proximate cause of (his) (her) own [injury]
[damages].

 [has] [have] the burden of proving this
(Defendant)
contention.

NOTE ON USE

This instruction is to be used with AMI 1602 and 1604 when there is an issue as to the plaintiff's negligence or other fault.

Research References

West's Key Number Digest
Animals §74(7)

Legal Encyclopedias
C.J.S., Animals §§ 349 to 353, 394

AMI 1604

**LIABILITY FOR DANGEROUS ANIMALS—
COMPARATIVE FAULT**

If you should find that the occurrence was proximately caused by the conduct of _____ in keeping
(defendant)
the animal and not by any fault on the part of _____,
(plaintiff)
then _____ is entitled to recover the full amount of
(plaintiff)
any damages *(he)* *(she)* has sustained as a result of
the occurrence.

If you find that the occurrence was proximately
caused both by _____'s conduct in keeping the
(defendant)
animal and by fault on the part of _____, then you
(plaintiff)
must determine their comparative fault.

If the fault of _____ is of less degree than the
(plaintiff)
fault of _____, then _____ is entitled to recover any
(defendant) (plaintiff)
damages which you may find *(he)* *(she)* has sustained
as a result of the occurrence after you have reduced
them in proportion to the degree of *(his)* *(her)* own
fault. On the other hand, if the fault of _____ is equal
(plaintiff)
to or greater in degree than the fault of _____, then
(defendant)
_____ is not entitled to recover any damages.
(plaintiff)

NOTE ON USE

This instruction is to be used with AMI 1602 and 1603 when there is an issue as to the plaintiff's negligence or other fault.

Research References

West's Key Number Digest
Animals ⌘74(7)

CHAPTER 17

COMMON CARRIERS

Table of Instructions

AMI

1701. Duty of Common Carrier to Passenger.
1702. Duty of Common Carrier to Protect Passengers from Other Passengers and Third Persons.

AMI 1701

DUTY OF COMMON CARRIER TO PASSENGER

At the time of the occurrence in question, _____ was a common carrier. A common carrier is not an insurer of its passengers' safety, but it has a duty to its passengers to use the highest degree of care consistent with the type of conveyance used and the practical operation of its business.

NOTE ON USE

When damages result from a defect in a station, depot, or other premises of carrier, use AMI 104. *See* Comment below.

COMMENT

This instruction was approved in *Yellow Cab Co. v. Dossett*, 244 Ark. 554, 426 S.W.2d 792 (1968).

Carriers are under a duty to use the highest degree of care which a prudent and cautious man would exercise and which is reasonably consistent with the mode of conveyance and practical operation of the means of carriage. *Missouri Pac. Transp. Co. v. Shepherd*, 203 Ark. 412, 157 S.W.2d 501 (1941).

When a passenger is in the depot, station, or on similar premises of the carrier, the duty owed is that of ordinary care. *Crown Coach Co. v. Whitaker*, 208 Ark. 535, 186 S.W.2d 940 (1945). In other words, the duty is the same as that owed to any other business invitee on the premises, which is set forth in AMI 1104.

The duty of exercising the highest degree of care remains on the carrier, however, while the passenger is boarding or alighting from the conveyance. *Checker Cab & Baggage Co. v. Harrison*, 191 Ark. 564, 87 S.W.2d 32 (1935).

An ambulance engaged in carrying passengers for hire is a common carrier and owes the duty set forth in this instruction. *Home Insurance Co. v. Covington*, 255 Ark. 409, 501 S.W.2d 219 (1973).

Private carriers are not common carriers and are not subject to the duty placed on common carriers. *Alpha Zeta Chapter of Pi Kappa Alpha Fraternity by Damron v. Sullivan*, 293 Ark. 576, 740 S.W.2d 127 (1987).

Research References

West's Key Number Digest
Carriers ⇨321(1)

Legal Encyclopedias
C.J.S., Carriers § 581

AMI 1702

**DUTY OF COMMON CARRIER TO PROTECT
PASSENGERS FROM OTHER PASSENGERS AND
THIRD PERSONS**

It is the duty of a common carrier to use the highest degree of care consistent with the practical operation of its business to protect its passengers from injury resulting from the conduct of *[other passengers]* *[third persons]* under circumstances when such conduct could reasonably have been foreseen and could have been prevented by the use of the highest degree of care.

COMMENT

This instruction is based on the supreme court holding in *Continental Southern Lines, Inc. v. Goodsell*, 247 Ark. 606, 446 S.W.2d 668 (1969); The general rule is that a carrier will not be held liable for injuries to passengers caused by the negligent or meddlesome conduct of other passengers, unless the carrier has notice of such conduct and reason to anticipate that injury may result therefrom. *Id.*

A carrier owes to its passengers the duty of protection from the violence and insults of other passengers or strangers, so far as this can be done by the exercise of a high degree of care, and will be held responsible for its own or its servants' negligence in this particular, when, by the exercise of proper care, the act of violence might have been foreseen and prevented. *Arkansas Power & Light Co. v. Steinheil*, 190 Ark. 470, 80 S.W.2d 921 (1935).

Research References

West's Key Number Digest: Carriers ⚙321(1)

Legal Encyclopedias
C.J.S., Carriers § 581

CHAPTER 18

RAILROADS

Table of Instructions

- AMI**
- 1801. Railroads—Duty to Sound Bell or Whistle for Crossing.
 - 1802. Duty of Railroad to Keep Lookout.
 - 1803. Speed of Train.
 - 1804. Railroads—Grade Crossings—Duty of Motorist to Look and Listen.
 - 1805. Railroads—Abnormally Dangerous Crossing—Definition—Duty to Warn.

AMI 1801

RAILROADS—DUTY TO SOUND BELL OR WHISTLE FOR CROSSING

To give warning of a train's approach, an audible warning device meeting standards prescribed by the Federal Railroad Administration shall be sounded at least one-quarter mile in advance of each location in Arkansas where a railroad crosses any public *[road]* *[highway]* *[or]* *[street]* and shall be sounded until the lead locomotive clears the crossing.

NOTE ON USE

This instruction should be given in the format of AMI 903 when the evidence justifies its use.

COMMENT

This instruction is based on Ark. Code Ann. § 23-12-410, which has been paraphrased.

If a train occupies a grade crossing blocking the highway, it is not necessary for the train crew to continue signaling with a bell or whistle. Under these circumstances it would be error to give this instruction. *St. Louis Southwestern Ry. Co. v. Robinson*, 228 Ark. 418, 308 S.W.2d 282 (1957). This decision is in accord with Arkansas precedent, which holds that when the presence of a train approaching or occupying a crossing is readily discoverable by means other than lights, signals, or flagmen, then these become irrelevant factors since there is no causal relationship as a matter of law. *See, i.e., Kansas City Southern Ry. Co. v. Baker*, 233 Ark. 610, 346 S.W.2d 215 (1961) (the plaintiff cannot recover, even though no signals were given, because if she saw the train approaching and walked in front of it, there can be no recovery regardless of whether the statutory signals were sounded); *Missouri Pac. R. Co. v. Dennis*, 205 Ark. 28, 166 S.W.2d 886 (1942) (the fact that statutory signals were not given is not the proximate cause of the collision where the undisputed evidence shows that the claimant by looking or listening could have seen and heard the approaching train); *Missouri Pac. R. Co. v. Carruthers*, 204 Ark. 419, 162 S.W.2d 912 (1942) (the failure to blow a whistle or to turn on the headlight on the train cease to be factors, and no recovery may be had, where the presence of the train is plainly discoverable by other means such as the sound of the train, a ringing gong, and a wig-wag signal); and *Missouri Pac. R. Co. v. Howard*, 204 Ark. 253, 161 S.W.2d 759 (1942) (as the danger increases, the degree of care required to free one of contributory negligence in a crossing accident increases). However, this rule is not absolute, being qualified by the existence of hazardous or unusual conditions prevailing at the site of the crossing, and under certain circumstances the plaintiff may still be entitled to this instruction although the train is readily discoverable. *St. Louis S.F. Ry. Co. v. Perryman*, 213 Ark. 550, 211 S.W.2d 647 (1948).

See also Louisiana and North West R. Co. v. Willis, 289 Ark. 410, 711 S.W.2d 805 (1986), a case in which a locomotive was blocking only a portion of the highway with its headlight angling away from the direction of highway travel.

Because of the extent and possible preemptive effect of federal regulation of railroads, the United States Code and the Code of Federal Regulations should always be considered in railroad cases.

Research References

West's Key Number Digest,
Railroads ¶351(9)

Legal Encyclopedias
C.J.S., Railroads § 1145

AMI 1802

DUTY OF RAILROAD TO KEEP LOOKOUT

All persons operating trains upon any railroad in this state have the duty to keep a constant lookout for *[persons] [and] [property]* upon, near, or approaching the railroad track. A violation of this duty is negligence.

This does not mean that each member of the train crew must keep a constant lookout, but it does mean that an efficient lookout must be kept by some member of the crew at all times.

NOTE ON USE

When negligence on the part of plaintiff or decedent is an issue the appropriate comparative fault instruction must be given. *See* AMI, Chapter 21.

COMMENT

This instruction is based on Ark. Code Ann. § 23-12-907.

Prior to 1961 the negligence of plaintiff or decedent was not a defense to a violation of the lookout statute by its own terms. Nor did the general comparative negligence statute apply to its violation. *Bond v. Missouri Pac. R. Co.*, 233 Ark. 32, 342 S.W.2d 473 (1961). However, the statute was amended in 1961 to include the comparative negligence concept and place violations of the lookout statute on a parity with other negligence actions. Ark. Code Ann. § 23-12-907. Under this amendment, the fact that a crossing accident occurs no longer creates a presumption of negligence on the part of the railroad company.

Under this statute the duty is owed to trespassers and licensees as well as invitees. *Missouri Pac. R. Co. v. Fikes*, 211 Ark. 256, 200 S.W.2d 97 (1947).

The statutory language "upon the track" means in addition "near or approaching the track." *Missouri Pac. R. Co. v. Greene*, 177 Ark. 217, 6 S.W.2d 26 (1928).

In regard to the second paragraph of this instruction, *see* *Missouri Pac. R. Co. v. Edwards*, 178 Ark. 732, 14 S.W.2d 230 (1928).

It was error to give this instruction when trainmen were keeping a lookout and the train could not have been stopped in time to avoid the collision after it became apparent that the driver of the car was not going to stop before crossing the tracks. *St. Louis Southwestern Ry. Co. v. Evans*, 254 Ark. 762, 497 S.W.2d 692 (1973).

In light of all the evidence, as well as all the instructions both given and requested, the trial court did not commit reversible error in giving the lookout instruction. *Missouri Pac. R. Co. v. Ellison*, 250 Ark. 160, 465 S.W.2d 85 (1971).

It was not error to refuse to give this instruction when the train crew was keeping a proper lookout and from a mile away saw the truck across the track moving slowly forward. The train crew had the right to assume that the truck driver would continue to move forward across the tracks, and the duty of the crew to take precautions began only when it became apparent that the truck driver would not get the truck off the tracks. *Northland Ins. Co. v. Union Pac. R. Co.*, 309 Ark. 287, 830 S.W.2d 850 (1992).

The Eighth Circuit has held this instruction applicable to a private railroad. *Wood v. Minnesota Mining and Mfg. Co.*, 112 F.3d 306 (8th Cir., 1997).

Because of the extent and possible preemptive effect of federal regulation of railroads, the United States Code and the Code of Federal Regulations should always be considered in railroad cases.

Research References

West's Key Number Digest
Railroads ◊351(9)

Legal Encyclopedias
C.J.S., Railroads § 1145

AMI 1803

SPEED OF TRAIN

COMMENT

The Secretary of Transportation, pursuant to authority initially conferred by the Railroad Safety Act of 1970, 45 U.S.C.A. §§ 421–447, has issued regulations setting speed limits for all trains according to each class of track upon which they travel. 49 C.F.R. § 213.9(a). The United States Supreme Court has held, in view of 45 U.S.C.A. § 434, that such regulation preempts any inconsistent state or local regulation including that implemented by legal duties imposed by the common law. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 113 S. Ct. 1732, 123 L. Ed. 2d 387 (1993). If, therefore, a train is operating within the limit set by the Secretary of Transportation, a finding of negligence cannot be predicated upon a claim that the speed was excessive.

It would appear, therefore, that an instruction concerning the speed of the train would be appropriate only where there was substantial evidence that the train exceeded the applicable federal speed limit. In that instance, it would also be essential to establish that the excessive speed was a proximate cause of the occurrence. E.g., *Harper v. Missouri Pac. R. Co.*, 229 Ark. 348, 314 S.W.2d 696 (1958); *St. Louis–S. F. Ry. Co. v. Thurman*, 213 Ark. 840, 213 S.W.2d 362 (1948).

Research References

West's Key Number Digest
Railroads ⇨351(10)

Legal Encyclopedias
C.J.S., Railroads § 1142

AMI 1804

**RAILROADS—GRADE CROSSINGS—DUTY OF
MOTORIST TO LOOK AND LISTEN**

A railroad grade crossing is a place of danger. It is the duty of the driver of a motor vehicle approaching a crossing to use ordinary care to look and listen for trains, which may require stopping (*his*) (*her*) vehicle if necessary to have an effective view of the tracks in both directions.

NOTE ON USE

Do not use the bracketed paragraph of AMI 901B with this instruction. In most railroad grade crossing cases one or more of the remaining paragraphs of AMI 901 will apply.

A statutory duty to stop is imposed upon certain types of vehicles and under certain circumstances. For instance, see Ark. Code Ann. §§ 27-51-703 to 27-51-705. In some cases it may be proper to use both this instruction, which embodies the duty imposed by common law, and AMI 903 with the incorporation of the proper statutory duty.

COMMENT

This instruction is based on *Missouri Pac. R. Co. v. Binkley*, 208 Ark. 933, 188 S.W.2d 291 (1945) (citing cases). It is the duty of the driver before driving onto a crossing, a known place of danger, to look and listen for an oncoming train, and if he could not see whether a train was coming, to stop his car or to place himself in such a position that he could have seen an approaching train. Failure to exercise this precaution may constitute contributory negligence and bar recovery. *Id.* Negligence of the injured party will not wholly defeat a recovery of damages, if the negligence is of a lesser degree than the operators of the train. See *Missouri Pac. R. Co. v. King*, 200 Ark. 1066, 143 S.W.2d 55 (1940).

This instruction does not apply to passengers in a motor vehicle. *St. Louis Southwestern Ry. Co. v. Pennington*, 261 Ark. 650, 553 S.W.2d 436 (1977).

Because of the extent and possible preemptive effect of federal regulation of railroads, the United States Code and the Code of Federal Regulations should always be considered in railroad cases.

Research References

West's Key Number Digest
Railroads ◊351(16)

Legal Encyclopedias
C.J.S., Railroads §§ 1147 to 1149

AMI 1804

RAILROADS - GRADE CROSSINGS - LIABILITY
MOTORIST TO STOP AND LOOK
A railroad is not stopping in a place of danger. It is the duty of the driver of a motor vehicle, when approaching a crossing, to stop and look for trains, and if he cannot see a train, to stop and wait until he can see a train, and if he cannot see a train, to stop and wait until he can see a train.

NOTE ON CASE
Do not use the bracketed paragraph of AMI 901, with this instruction, in such railroad grade crossing cases, one or more of the following paragraphs, the AMI 901 will apply.
A statutory duty to stop is imposed upon certain types of vehicles and not upon all vehicles. In such cases, the duty to stop is imposed upon the driver of the vehicle, and not upon the railroad. The duty to stop is imposed upon the driver of the vehicle, and not upon the railroad. The duty to stop is imposed upon the driver of the vehicle, and not upon the railroad.

THE PRESENT CASE IS BASED ON *Ark. & W. Ry. Co. v. Binkley*, 208 Ark. 308, 188 S.W.2d 291 (1946) (citing *Ark. & W. Ry. Co. v. Binkley*, 208 Ark. 308, 188 S.W.2d 291 (1946)). The court in *Binkley* held that a driver of a motor vehicle approaching a railroad grade crossing has a duty to stop and look for trains, and if he cannot see a train, to stop and wait until he can see a train. The court in *Binkley* held that a driver of a motor vehicle approaching a railroad grade crossing has a duty to stop and look for trains, and if he cannot see a train, to stop and wait until he can see a train.

This instruction does not apply to passenger cars or to vehicles. Because of the danger and possible consequences of failure to stop at railroad grade crossings, the *Ark. & W. Ry. Co. v. Binkley* rule should be considered in railroad cases.

AMI 1805

**RAILROADS—ABNORMALLY DANGEROUS
CROSSING—DEFINITION—DUTY TO WARN**

 contend(s) that the railroad grade cross-
(Plaintiff(s))
ing in this case was abnormally dangerous.
(Plaintiff(s))
(has) (have) the burden of proving this proposition.

If a railroad grade crossing is frequently used by the traveling public, if trains pass over it frequently, and if the crossing is so dangerous because of surrounding circumstances that a reasonably careful person could not use it with reasonable safety in the absence of special warnings, then it would be an abnormally dangerous crossing. Whether the railroad grade crossing in this case was abnormally dangerous is for you to decide.

If you find that the crossing was abnormally dangerous, as I have defined that term, then it was the duty of the railroad to use ordinary care to give a warning reasonably sufficient to permit the traveling public to use the crossing with reasonable safety.

COMMENT

This instruction is based on *St. Louis Southwestern Ry. Co. v. Jackson*, 242 Ark. 858, 416 S.W.2d 273 (1967), appeal after remand, 246 Ark. 268, 438 S.W.2d 41 (1969) and *St. Louis Southwestern Ry. Co. v. Farrell*, 242 Ark. 757, 416 S.W.2d 334 (1967). This instruction should be given where evidence is presented that a railroad crossing is abnormally dangerous. *Redman v. St. Louis Southwestern Ry. Co.*, 316 Ark. 636, 873 S.W.2d 542 (1994).

The evidence, when viewed most favorably, was insubstantial and insufficient to meet the burden of proof to establish the required elements for an "abnormally dangerous crossing" as defined by this instruction. *Chicago R. I. & P. R. Co. v. Gray*, 248 Ark. 640, 453 S.W.2d 54 (1970). A railroad may be found negligent for its failure to give special warnings at a crossing which is rendered abnormally dangerous

by reason of unusual circumstances or conditions. Questions as to the nature of the crossing and the adequacy of the particular warning devices are for the jury so long as the evidence reasonably can be said to generate the issues. *Scoville v. Missouri Pac. R. Co.*, 458 F.2d 639 (8th Cir. 1972).

Travel of 115 cars and two school buses over a grade crossing in a period of twenty-four hours does not show frequent usage by the traveling public. *St. Louis Southwestern Ry. Co. v. Evans*, 254 Ark. 762, 497 S.W.2d 692 (1973).

Even where, under the totality of the circumstances standard adopted in *Missouri Pacific R. Co. v. Biddle*, 293 Ark. 142, 732 S.W.2d 473 (1987), the jury is entitled to find that a crossing is abnormally dangerous, this instruction should not be given where warnings have been installed at the crossing and there is no showing that the warning devices are inadequate. *Northland Ins. Co. v. Union Pac. R. Co.*, 309 Ark. 287, 830 S.W.2d 850 (1992).

The common law duty expressed by this instruction is, in many instances, preempted by federal law. See *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 113 S. Ct. 1732, 123 L. Ed. 2d 387 (1993). Once warning devices paid for with federal funds are installed and operating, the railroad's common law duty to determine what warning devices are adequate for a particular crossing ceases, and it is entitled to the benefit of federal preemption. *Union Pac. R. Co. v. Sharp*, 330 Ark. 174, 952 S.W.2d 658 (1997). Thus, the Eighth Circuit's interpretation of *Easterwood* is followed. *Kiemele v. Soo Line R. Co.*, 93 F.3d 472 (8th Cir. 1996); *Elrod v. Burlington Northern R. Co.*, 68 F.3d 241 (8th Cir. 1995). The opinion in *Union Pac. R. Co. v. Sharp*, *supra*, gives a brief description of statewide crossing upgrade projects substantially financed with federal funds.

The duty of the railroad to maintain warning devices is a separate and distinct duty from what types of warning devices are needed at a particular intersection, and is not preempted by the Highway Safety Act. *Union Pac. R. Co. v. Sharp*, *supra*.

Research References

West's Key Number Digest
Railroads ⚡351(4), 351(7)

Legal Encyclopedias
C.J.S., Railroads §§ 1142 to 1143

CHAPTER 19

DRAM SHOP

AMI 1901

DRAMSHOP LIABILITY—SALE TO A MINOR

Arkansas law prohibits an alcoholic beverage retailer from selling alcoholic beverages to a person who the retailer knows or reasonably should know is a minor.

_____ alleges and has the burden of proving the
(Plaintiff)
following:

First, that _____ sold alcoholic beverages to
(Defendant)
_____, who was a minor; and
(Minor)

Second, that _____ knew or reasonably should
(Defendant)
have known that _____ was a minor; and
(Minor)

Third, that such knowing sale was a proximate
cause of _____ damages.
(Plaintiff's)

COMMENT

This instruction is based on Ark. Code Ann. § 16-126-103. *See also* AMI 501 (definition of proximate cause).

AMI 1902

**DRAMSHOP LIABILITY—SALE TO AN
INTOXICATED PERSON**

Arkansas law prohibits an alcoholic beverage retailer from selling alcoholic beverages to a person who the retailer knows or reasonably should know is clearly intoxicated.

 alleges and has the burden of proving the following:
(Plaintiff)

First, that sold alcoholic beverages to
(Defendant)
 ; and
(Intoxicated Person)

Second, that knew or reasonably should
(Defendant)
have known that was so obviously
(Intoxicated Person)
intoxicated at the time of the sale that [he][she] presented a clear danger to others; and

Third, that such sale was a proximate cause of
damages.
(Plaintiffs)

NOTE ON USE

Do not use AMI 606 with this instruction.

COMMENT

This instruction is based on Ark. Code Ann. § 16-126-104.

To establish a *prima facie* case under § 16-126-104, the plaintiff must allege that the intoxicated person caused the injury. See *Sluder v. Steak and Ale of Little Rock, Inc.*, 361 Ark. 267, 275, 206 S.W.3d 213, 217 (2005). The statute adds a specific requirement that proof of proximate cause include a causal link between the intoxicated person and the injured third party. *Id.*, 206 S.W.3d at 218; see also AMI 501 (definition of proximate cause).

Ark. Code Ann. § 16-126-104 provides the following affirmative defense:

It shall be an affirmative defense to civil liability under this section that an alcoholic beverage retailer had a reasonable belief that the person was not clearly intoxicated at the time of such sale or that the person would not be operating a motor vehicle while in the impaired state.

The Committee has declined to provide a separate instruction for the affirmative defense for two reasons. First, it is unclear whether there is a difference between "reasonably should have known" in the claim and "reasonable belief" in the defense; thus, the affirmative defense might inadvertently shift the initial burden of proving the elements of the claim from the plaintiff to the defendant. Second, because the affirmative defense uses the disjunctive 'or,' the verbatim instruction of the jury from the statute might inadvertently provide a defense in cases not involving the operation of a motor vehicle.

CHAPTER 20

EMINENT DOMAIN

AMI 2001

NATURE OF ACTION—BURDEN OF PROOF

This action by _____ is brought in the
(the condemning authority)
exercise of the power of eminent domain. It is sometimes called a condemnation proceeding. By this means, _____ may lawfully acquire the
(the condemning authority)
property involved for public purposes.

_____ taking of _____ property
(The condemning authority's) (the property owner's)
was necessary and proper under the law. The power of eminent domain, however, is always subject to the constitutional requirement that _____ pay
(the condemning authority)
just compensation for all interests in the property taken.

Your only duty in this matter is to determine the amount of just compensation to be awarded to _____
(the
property owner) _____ has the burden of proving the
(The property owner)
just compensation due [him][her][it] for the property taken.

NOTE ON USE

This instruction may be used at the time the Court is advising the jury of the nature of the case and/or in the final jury instructions.

This instruction may be modified to include a statement describing

the law under which the condemning authority is authorized to acquire title to the property and the purpose of the acquisition.

This instruction may also be modified to include a description of the amount of property being taken by the condemning authority, the amount of any property remaining after the taking, the date of the taking, and whether the case involves a temporary construction easement.

See AMI 202 for an instruction regarding preponderance of the evidence and burden of proof.

COMMENT

This instruction is modeled in part after O'MALLEY, GRENIG AND LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS §§ 154:1, :10, :20 (6th ed.), and it is based on *Burton v. Ward*, 218 Ark. 253, 255–56, 236 S.W.2d 65, 66 (1951) (holding that the statutory proceeding to condemn land is a special proceeding directed solely to the object of determining the compensation to be paid the owner of the property proposed to be taken, and the only issue to be tried is the value of the property to be taken).

The property owner has the burden of proving fair market value. *See Ark. State Highway Comm'n v. S. Dev. Corp.*, 250 Ark. 1016, 1020, 469 S.W.2d 102, 105 (1971); *Ark. State Highway Comm'n v. Hambuchen*, 243 Ark. 832, 833, 422 S.W.2d 688, 689 (1968); *Prop. Owners Improvement Dist. No. 247 v. Williford*, 40 Ark. App. 172, 180–81, 843 S.W.2d 862, 867–68 (1992).

In condemnation proceedings brought by the Arkansas Highway Commission, the court shall award costs, expenses and reasonable attorney's fees to the property owner if the compensation awarded exceeds the monies deposited in the court by 20% or more. Ark. Code Ann. § 27-67-317(b).

AMI 2002

DAMAGES—PARTIAL TAKING BY SOVEREIGN

In arriving at the amount of just compensation to which _____ is entitled, you first determine the
(the property owner)

fair market value of the whole property immediately before the taking, and then you determine the fair market value of the remaining property immediately after the taking. The compensation _____ is
(the property owner)

entitled to recover is the difference, if any, between the fair market value of the whole property immediately before the taking and the fair market value of the remaining property immediately after the taking. In determining the fair market value of the remaining property immediately after the taking, you should consider the remaining property as if _____

_____ (the condemning authority's) project was completed and permanently in place according to the construction plans now on file.

NOTE ON USE

Use this instruction when (1) the condemning authority is the sovereign, and (2) the condemning authority has taken only a portion of a larger tract of land owned by the landowner.

If the condemning authority is an entity other than the sovereign, such as a railroad, a telephone company, or an electric company, then do not use this instruction. Use AMI 2003 instead.

COMMENT

This instruction is based on *Pope v. Overton*, 2011 Ark. 11, 376 S.W.3d 400; *Arkansas State Highway Commission v. Littlefield*, 247 Ark. 686, 447 S.W.2d 146 (1969); and *Property Owners Improvement District No. 247 v. Williford*, 40 Ark. App. 172, 843 S.W.2d 862 (1992).

The Arkansas Supreme Court has recognized three "formulas for measuring just compensation in partial-taking cases: (1) the value of the part taken; (2) the value of the part taken plus the damages to the

remainder; [and] (3) the before- and after-value rule." *See* Ark. State Highway Comm'n v. Frisby, 329 Ark. 506, 508, 951 S.W.2d 305, 306 (1997); Ark. State Highway Comm'n v. Barker, 326 Ark. 403, 405, 931 S.W.2d 138, 140 (1996); *Young v. Ark. State Highway Comm'n*, 242 Ark. 812, 814, 415 S.W.2d 575, 577 (1967). The court uses the third formula when the condemning authority is the sovereign. *See Barker*, 326 Ark. at 407, 931 S.W.2d at 141; *Young*, 242 Ark. at 814-15, 415 S.W.2d at 577; *see also* Ark. State Highway Comm'n v. Jones, 256 Ark. 40, 41, 505 S.W.2d 210, 211 (1974). The court uses the second formula when the condemning authority is an entity other than the sovereign. *See Pope*, 2011 Ark. 11, at 4-5, 376 S.W.3d at 404-05; *Williford*, 40 Ark. App. at 178, 843 S.W.2d at 866. The court in *Young* acknowledged that "[t]he distinction between the second and third formulas is narrow." 242 Ark. at 814, 415 S.W.2d at 577.

In *Pope*, the court stated that when the sovereign exercises its right to take a portion of a tract of land, the proper measurement of just compensation is the difference in the fair market value of the entire tract immediately before the taking and the fair market value immediately after the taking. 2011 Ark. 11, at 4, 376 S.W.3d at 404. Hence, any special benefit resulting from the public use of the land taken by the sovereign, which increases the value of the land not taken, will offset the amount the sovereign will have to pay. This is proper because the owner of the land has received just compensation, although partly by the increase in value of the land he or she has left. *See Williford*, 40 Ark. App. 172, at 177, 843 S.W.2d at 865.

"[W]here a public use for which a portion of a landowner's land is taken so enhances the value of the remainder as to make it of greater value than the whole before the taking, the owner has received just compensation for his property in benefits; . . . the benefits which will be considered must be those which are local, peculiar, and special to the owner, i.e., benefits not enjoyed by the general public." *See* Ark. State Highway Comm'n v. Davis, 245 Ark. 813, 819, 434 S.W.2d 605, 608 (1968).

The condemning authority has the burden of proving enhancement in value by reason of the improvements. *See* Greene Cnty. v. Hicks, 249 Ark. 69, 71, 458 S.W.2d 152, 153 (1970).

AMI 2003

DAMAGES—PARTIAL TAKING BY ENTITY OTHER THAN SOVEREIGN

In arriving at the amount of just compensation to which _____ in this case is entitled, you
(the property owner)
determine the fair market value of the portion of the property taken [plus any damage to the remaining property]. You are not to consider any benefits that remaining property may receive as a
(the property owner's)
result of the taking.

[In this case, (the property owner) claims that [his/her/its] remaining property has lost value as a result of the taking. This loss in value is called “severance damages” and must be included in determining just compensation if the fair market value of the remaining property is reduced by the taking. The severance damages to which (the property owner) is entitled is the diminution or lowering of the fair market value, if any, of the property not taken that has been caused by the taking of the part taken. The amount of severance damages is the difference between the fair market value of the remaining property before the taking and the fair market value of the remaining property after the taking.]

NOTE ON USE

Use this instruction when (1) the condemning authority is an entity other than the sovereign, such as a railroad, a telephone company, or an electric company, and (2) the condemning authority has taken only a portion of a larger tract of land owned by the landowner.

If the condemning authority is the sovereign, then do not use this instruction. Use AMI 2002 instead.

Use the bracketed clause in the first paragraph and the final

bracketed paragraph when the property owner claims his remaining property has lost value as a result of the taking.

COMMENT

This instruction is based on *Pope v. Overton*, 2011 Ark. 11, 376 S.W.3d 400 and *Property Owners Improvement District No. 247 v. Williford*, 40 Ark. App. 172, 843 S.W.2d 862 (1992).

The Arkansas Supreme Court has recognized three “formulas for measuring just compensation in partial-taking cases: (1) the value of the part taken; (2) the value of the part taken plus the damages to the remainder; [and] (3) the before- and after-value rule.” *See Ark. State Highway Comm’n v. Frisby*, 329 Ark. 506, 508, 951 S.W.2d 305, 306 (1997); *Ark. State Highway Comm’n v. Barker*, 326 Ark. 403, 405, 931 S.W.2d 138, 140 (1996); *Young v. Ark. State Highway Comm’n*, 242 Ark. 812, 814, 415 S.W.2d 575, 577 (1967). The court uses the third formula when the condemning authority is the sovereign. *See Barker*, 326 Ark. at 407, 931 S.W.2d at 141; *Young*, 242 Ark. at 814–15, 415 S.W.2d at 577; *see also Ark. State Highway Comm’n v. Jones*, 256 Ark. 40, 41, 505 S.W.2d 210, 211 (1974). The court uses the second formula when the condemning authority is an entity other than the sovereign. *See Pope*, 2011 Ark 11, at 4–5, 376 S.W.3d at 404–05; *Williford*, 40 Ark. App. at 178, 843 S.W.2d at 866. The court in *Young*, acknowledged that “[t]he distinction between the second and third formulas is narrow.” 242 Ark. at 814, 415 S.W.2d at 577.

When the condemning authority is the sovereign, the compensation owed by the sovereign is offset by any special benefit resulting from the public use of the land taken. *See Pope*, 2011 Ark. 11, at 4–5, 376 S.W.3d at 404. However, when the condemning authority is an entity other than the sovereign, full compensation must be paid “irrespective of any benefit from any improvement proposed by [the condemning authority].” *Williford*, 40 Ark. App. at 177, 843 S.W.2d at 866.

sovereign, and (2) the condemning authority is taking an easement over the property rather than fee simple title.

Use the bracketed clause in the first paragraph and the final bracketed paragraph when the property owner claims his remaining property has lost value as a result of the taking.

COMMENT

This instruction is based on *Baucum v. Arkansas Power & Light Co.*, 179 Ark. 154, 15 S.W.2d 399 (1929), *Cramer v. Arkansas Oklahoma Gas Corp.*, 316 Ark. 465, 872 S.W.2d 390 (1994), and *Wilmoth v. Southwest Arkansas Utilities Corp.*, 2015 Ark. App. 185 (2015).

AMI 2006

DEFINITION—FAIR MARKET VALUE

When I use the expression “fair market value,” I mean the amount of money which a purchaser who is willing but not obligated to buy the property would pay to an owner who is willing but not obligated to sell it, taking into consideration all uses to which the land is adapted and might reasonably be applied. Fair market value is not necessarily based on the use to which the property was being put at the date of taking, but is to be based on the fair market value of the land put to its highest and best use.

NOTE ON USE

Use this instruction only in cases involving eminent domain. In all other cases requiring a definition of “fair market value,” use AMI 2221.

COMMENT

This instruction is based on *Arkansas State Highway Commission v. Marshall*, 253 Ark. 212, 485 S.W. 2d 740 (1972); *Arkansas State Highway Commission v. Delaughter*, 250 Ark. 990, 468 S.W.2d 242 (1971); and *Arkansas State Highway Commission v. Pearrow*, 1 Ark. App. 289, 614 S.W. 2d 695 (1981).

A landowner “is entitled to compensation based on the [fair] market value of the land put to its highest and best use.” *Delaughter*, 250 Ark. at 1001, 468 S.W.2d at 247.

“[J]ust compensation in an eminent domain case is not to be arrived at by speculation and conjecture.” *Simmons v. Ark. State Highway Comm’n*, 259 Ark. 503, 505, 534 S.W.2d 16, 18 (1976).

“A landowner is entitled to show every advantage that his property possesses, present and prospective, to have his witnesses state any and every fact concerning the property which he would naturally adduce in order to place it in an advantageous light if he were selling it to a private individual, and to show the availability of this property for any and all purposes for which it is plainly adapted or for which it is likely to have value and induce purchases.” *Ark. State Highway Comm’n v. First Pyramid Life Ins. Co.*, 269 Ark. 278, 283–84, 602 S.W.2d 609, 612–13 (1980).

AMI 2007

DEFINITION—HIGHEST AND BEST USE

The “highest and best use” of the property means the most favorable purpose to which the property is adaptable and the most valuable purpose for which it could have been used in the not too distant future. Highest and best use means the most advantageous use to which the property could actually be put without entering into speculation. It is the use of the property that would produce the maximum economic value on the date of the taking.

COMMENT

This instruction is based on *Arkansas State Highway Commission v. Delaughter*, 250 Ark. 990, 468 S.W.2d 242 (1971); *Arkansas State Highway Commission v. Pearrow*, 1 Ark. App. 289, 614 S.W. 2d 695 (1981); and *Rest Hills Memorial Park, Inc. v. Clayton Chapel Sewer Improvement District*, 6 Ark. App. 180, 639 S.W.2d 519 (1982).

A landowner is entitled to compensation based on the fair market value of the land put to its highest and best use. *Delaughter*, 250 Ark. at 1001, 468 S.W.2d at 247.

“[A] verdict rendered by a jury, which was partially based on testimony relating to the commercial value of the land, and partially based on testimony relating to the land’s value for residential purposes, would not be proper, but it is for the jury to determine the best and highest use of a landowner’s property.” *Ark. State Highway Comm’n v. Griffin*, 241 Ark. 1033, 1039, 411 S.W.2d 495, 499 (1967).

“A landowner is entitled to show every advantage that his property possesses, present and prospective, to have his witnesses state any and every fact concerning the property which he would naturally adduce in order to place it in an advantageous light if he were selling it to a private individual, and to show the availability of this property for any and all purposes for which it is plainly adapted or for which it is likely to have value and induce purchases.” *Ark. State Highway Comm’n v. First Pyramid Life Ins. Co.*, 269 Ark. 278, 283–84, 602 S.W.2d 609, 612–13 (1980).

AMI 2008

FAIR MARKET VALUE—FACTORS TO CONSIDER

In determining the fair market value of property, you may consider not only the opinions of the various witnesses who testified as to market value, but also all other evidence in the case which may aid in determining market value, such as location of the property, the surroundings and general environment, any particular suitability of the property for particular uses, and the reasonable probabilities as to future potential uses, if any, for which the property was suitable or physically adaptable, all as shown by the evidence at the time of taking.

COMMENT

This instruction is modeled after O'MALLEY, GRENIG AND LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 154:51 (6th ed.), and it is based on *Arkansas State Highway Commission v. Post*, 330 Ark. 369, 955 S.W.2d 496 (1997); *Arkansas State Highway Commission v. First Pyramid Life Insurance Co.*, 269 Ark. 278, 602 S.W.2d 609 (1980); and *Arkansas Power & Light Co. v. Childers*, 253 Ark. 894, 489 S.W.2d 776 (1973).

AMI 2009

FAIR MARKET VALUE—OWNER'S TESTIMONY

The law permits _____, as the owner of the
(the property owner),
property taken in this condemnation proceeding, to testify as to the fair market value of [his][her][its] property immediately before and immediately after the date of taking. The testimony of a property owner as to value is to be weighed and considered by you the same as that of any other witness expressing an opinion of the fair market value of the property both before and after the date of the taking. That is to say, if you should decide that the reasons given in support of a property owner's opinion as to the fair market value has no fair or logical basis of support for it, you may reject that opinion; or you may give it any weight you may think it deserves.

COMMENT

This instruction is modeled after O'MALLEY, GRENIG AND LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 154:58 (6th ed.), and it is based on *Arkansas State Highway Commission v. Taylor*, 269 Ark. 458, 602 S.W.2d 657 (1980); *Arkansas State Highway Commission v. Darr*, 246 Ark. 204, 437 S.W.2d 463 (1969); and *Arkansas Oklahoma Gas Corp. v. Burton*, 10 Ark. App. 419, 664 S.W.2d 894 (1984).

In *Taylor*, the Court held that a landowner's opinion as to the value of his land is admissible in evidence whether he knows anything about land market values in the area or not. His value opinion "is admissible [in evidence] simply because he owns the land and is qualified to state an opinion as to the value of what he owns." 269 Ark. at 463, 602 S.W.2d at 660. But such opinion testimony, either by the landowner or by his value witnesses, may be stricken on motion if there is no fair or logical basis for its support. *Id.*

A landowner's testimony should have been stricken when it was not grounded in evidence of market value but was instead "based solely on his 'feeling' or what he would have asked for the land and not on any facts or figures [grounded in evidence of market value]." *Ark. State Highway Comm'n v. Frisby*, 329 Ark. 506, 510, 951 S.W.2d 305, 307

(1997).

AMI 2010

**DAMAGES—TEMPORARY CONSTRUCTION
EASEMENT**

(The property owner) **[also] seeks just compensation for a temporary construction easement taken by _____
(the condemning authority).** The amount of just compensation for a temporary construction easement is the fair rental value of the property within the easement area for the period of time it **[was] [will be]** used.

NOTE ON USE

Use this instruction when the condemning authority has taken a temporary easement on land for a specific purpose and the property owner claims damages for the temporary easement.

COMMENT

This instruction is based on *City of Fort Smith v. Findlay*, 48 Ark. App. 197, 893 S.W.2d 358 (1995).

AMI 2011

EVIDENCE OF SALES AND LEASES OF
COMPARABLE PROPERTIES

Evidence has been received as to *[sales]* *[and]* *[leases]* of allegedly comparable properties in the vicinity and in other areas. Bona fide *[sales]* *[and]* *[leases]* of comparable properties made within a reasonable time of the date of taking of the property involved may be considered by you in determining the fair market value at the time of taking. Such evidence may be considered to the extent you find it assists in determining fair market value.

NOTE ON USE

Use this instruction only if evidence of sales or leases of comparable properties has been received.

COMMENT

This instruction is modeled after O'MALLEY, GREINIG AND LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 154:61 (6th ed.), and it is based on *Arkansas State Highway Commission v. Roberts*, 246 Ark. 1216, 441 S.W.2d 808 (1969). *See also* *Ark. State Highway Comm'n v. Alvin Samuel Gin Co.*, 256 Ark. 669, 510 S.W.2d 65 (1974).

Factors of similarity include "location, size and sale price; conditions surrounding the sale of the property, such as the date and character of the sale; business and residential advantages or disadvantages; *[and]* unimproved, improved, or developed land." *See* *Ark. State Highway Comm'n v. Witkowski*, 236 Ark. 66, 69, 364 S.W.2d 309, 311 (1963).

The Arkansas Supreme Court has held that it is error for the trial court to allow evidence of a condemnor's court deposit or appraisal of a nearby tract of land as proof of valuation in a condemnation action because such "sales" are not fair criteria of value for purposes of showing comparable sales in determining just compensation due the landowner. *Ark. State Highway Comm'n v. Barker*, 326 Ark. 403, 406, 931 S.W.2d 138, 140 (1996). The court has stated that the amount a condemning party has paid for property is not competent evidence of the value in any case, whether in a proceeding by the same condemning party, or in other cases, because such sales are not voluntary transac-

tions and are in the nature of a compromise. *Id.* (citing *Yonts v. Public Serv. Co. of Ark.*, 179 Ark. 695, 17 S.W.2d 886 (1929)). *See also* GSS, LLC v. Centerpoint Energy Gas Transmission Co., 2014 Ark. 144, 432 S.W.3d 583 (2014) (citing *Barker* and *Yonts* with approval).

AMI 2012

**EVIDENCE AS TO PURCHASE PRICE OF
PROPERTY TAKEN**

Evidence has been received as to the purchase price of the property when acquired by _____
(the property owner)

In arriving at your conclusion as to the fair market value of the property at the time of taking, the price paid by _____ constitutes one transaction in
(the property owner)
the vicinity that you may consider, along with the other evidence.

NOTE ON USE

Use this instruction only if evidence of the purchase price of the property when acquired by the property owner has been received.

COMMENT

This instruction is modeled after O'MALLEY, GREINIG AND LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 154:62 (6th ed.). The prior sale of the property to the property owner is admissible if recent, voluntary, and between parties who were "capable and desirous of protecting [their] own interests" and if no change in conditions or fluctuations in value have occurred since the sale. Ark. Power & Light v. Llewellyn, 268 Ark. 839, 840, 595 S.W.2d 712, 712 (1980) (evidence of prior sale admissible five years from the landowner's purchase to the date of taking); Ark. State Highway Comm'n v. Hubach, 257 Ark. 117, 118, 514 S.W.2d 386 (1974) (evidence of prior sale admissible four years and four months from the landowner's purchase to the date of taking).

CHAPTER 21

COMPARATIVE FAULT— GENERAL VERDICT

Table of Instructions

AMI

- 2101. Comparative Negligence or Fault—Claim by One Plaintiff—No Counterclaim.
- 2102. Comparative Negligence or Fault—Plaintiff Suing in Representative Capacity.
- 2103. Comparative Negligence or Fault—Complaint and Counterclaim—One Plaintiff and One Defendant.
- 2104. Comparative Negligence or Fault—Complaint Against Principal and Agent—Counterclaim by Principal Only.
- 2105. Comparative Negligence or Fault—Complaint Against Principal and Agent—Counterclaim by Both Defendants.
- 2106. Comparative Negligence or Fault—Complaint of Principal and Agent—Counterclaim by Defendant.
- 2107. Comparative Negligence or Fault—Complaint and Counterclaim—Complaint of Principal and Agent—Counterclaim by Principal and Agent.
- 2108. Comparative Negligence or Fault—Multiple Claims—No Imputed Negligence—No Joint Tortfeasors.
- 2109. Comparative Negligence or Fault—Multiple Claims—Imputed Negligence.
- 2110. Comparative Negligence or Fault—Multiple Claims—Joint Tortfeasors—No Imputed Negligence.

AMI 2101

COMPARATIVE NEGLIGENCE OR FAULT—CLAIM BY ONE PLAINTIFF—NO COUNTERCLAIM

If you should find that the occurrence was proximately caused by negligence on the part of _____
(defendant)
and not by negligence on the part of _____, then
(plaintiff)

is entitled to recover the full amount of any
(plaintiff)
damages you may find [he][she] has sustained as a
result of the occurrence.

If you should find that the occurrence was proxi-
mately caused by negligence of both and
(plaintiff)
 , then you must compare the percentages of
(defendant)
their negligence.

If the negligence of is of less degree than
(plaintiff)
the negligence of , then is entitled to re-
(defendant) (plaintiff)
cover any damages which you may find [he][she] has
sustained as a result of the occurrence after you have
reduced them in proportion to the degree of [his][her]
own negligence.

On the other hand, if was not negligent or
(defendant)
if the negligence of is equal to or greater in
(plaintiff)
degree than the negligence of , then is
(defendant) (plaintiff)
not entitled to recover any damages.

NOTE ON USE

Do not use this instruction when the case is submitted on
interrogatories.

When AMI 301 is given, substitute "fault" for "negligence."

When damages are sought from co-defendants, this instruction
should be given only when it is admitted that the negligence or fault of
one is imputed to the other and the name of the individual personally
charged with negligence or fault should be inserted. When joint tortfea-
sors are involved, use AMI 2110.

When plaintiff is suing in a representative capacity use AMI 2102.

COMMENT: OF BEHAVIOR

This instruction is based on Ark. Code Ann. § 16-64-122.

A party who admits fault is not thereby barred from asserting comparative fault on the part of the other party. *Bryant v. Eifling*, 301 Ark. 172, 782 S.W.2d 580 (1990).

Research References

West's Key Number Digest
Negligence §1746

Legal Encyclopedias
C.J.S., Negligence §§ 995, 1005, 1010, 1018 to 1019

AMI 2102

COMPARATIVE NEGLIGENCE OR FAULT— PLAINTIFF SUING IN REPRESENTATIVE CAPACITY

If you should find that _____ was not negligent
(deceased)
or that [his][her] negligence was not a proximate
cause of the occurrence, then _____, the administra-
(plaintiff)
tor, is entitled to recover the full amount of any dam-
ages which were proximately caused by any negli-
gence of _____.
(defendant)

If you should find that the occurrence was proxi-
mately caused by negligence of both _____ and _____
(deceased) (defen-
dant), then you must compare the percentages of their
negligence. If the negligence of _____ was of less
(deceased)
degree than the negligence of _____, then _____, the
(defendant) (plaintiff)
administrator, is entitled to recover any damages
sustained as a result of the occurrence after you have
reduced them in proportion to the degree of the
negligence of _____.
(deceased)

On the other hand, if _____ was not negligent or
(defendant)
if the negligence of _____ was equal to or greater
(deceased)
than the negligence of _____, then _____, the
(defendant) (plaintiff)
administrator, is not entitled to recover any damages.

NOTE ON USE

Do not use this instruction when the case is submitted on
interrogatories.

When AMI 301 is given, substitute "fault" for "negligence."

This instruction is, in part, illustrative in that with slight adaptation it can be used when a parent sues for injuries to his minor child or a spouse sues for loss of consortium.

COMMENT

This instruction is based on Ark. Code Ann. § 16-64-122.

Research References

West's Key Number Digest
Negligence §1746

Legal Encyclopedias
C.J.S., Negligence §§ 995, 1005, 1010, 1018 to 1019

AMI 2103

**COMPARATIVE NEGLIGENCE OR FAULT—
COMPLAINT AND COUNTERCLAIM—ONE
PLAINTIFF AND ONE DEFENDANT**

If you should find that _____ was not negligent or
(plaintiff)
that [his][her] negligence was not a proximate cause
of the occurrence, then [he][she] is entitled to recover
the full amount of any damages you may find [he][she]
has sustained which were proximately caused by any
negligence of _____.
(defendant)

If you should find that _____ was not negligent
(defendant)
or that [his][her] negligence was not a proximate
cause of the occurrence, then [he][she] is entitled to
recover the full amount of any damages you may find
[he][she] has sustained which were proximately
caused by any negligence of _____.
(plaintiff)

If you should find that the occurrence was proxi-
mately caused by negligence of both _____ and
(plaintiff)
_____, then you must compare the percentages of
(defendant)
their negligence.

If the negligence of _____ was of less degree than
(plaintiff)
the negligence of _____, then you should find for
(defendant)
_____ on [his][her] complaint, and also for [him][her]
(plaintiff)
on the counterclaim of _____. However, you must
(defendant)
reduce the damages of _____ in proportion to the
(plaintiff)
degree of [his][her] own negligence.

If the negligence of _____ was of less degree
(defendant)
than the negligence of _____, then you should find for
(plaintiff)
_____ on [his][her] counterclaim, and also for [him]
(defendant)
[her] on the complaint of _____. However, you must
(plaintiff)
reduce the damages of _____ in proportion to the
(defendant)
degree of [his][her] own negligence.

If you should find that _____ and _____ were
(plaintiff) (defendant)
equally negligent or that neither was negligent, then
neither can recover from the other and you should
find against _____ on [his][her] complaint and against
(plaintiff)
_____ on [his][her] counterclaim.
(defendant)

NOTE ON USE

Do not use this instruction when the case is submitted on interrogatories.

When AMI 301 is given, substitute "fault" for "negligence."

COMMENT

This instruction is based on Ark. Code Ann. § 16-64-122.

Research References

West's Key Number Digest
Negligence ¶1746

Legal Encyclopedias
C.J.S., Negligence §§ 995, 1005, 1010, 1018 to 1019

AMI 2104

**COMPARATIVE NEGLIGENCE OR FAULT—
COMPLAINT AGAINST PRINCIPAL AND AGENT—
COUNTERCLAIM BY PRINCIPAL ONLY**

If you should find that _____ was not negligent or
(plaintiff)
that [his][her] negligence was not a proximate cause
of the occurrence, then [he][she] is entitled to recover
the full amount of any damages you may find [he][she]
has sustained which were proximately caused by any
negligence of _____.
(defendant agent)

If you should find that _____ was not negli-
(defendant agent)
gent or that [his][her] negligence was not a proximate
cause of the occurrence, then _____ is entitled
(defendant principal)
to recover the full amount of any damages you may
find [he][she] has sustained which were proximately
caused by any negligence of _____.
(plaintiff)

If you should find that the occurrence was proxi-
mately caused by negligence of both _____ and
(plaintiff)
_____, then you must compare the percentages
(defendant agent)
of the negligence of these two parties.

If the negligence of _____ was of less degree than
(plaintiff)
the negligence of _____, then you should find for
(defendant agent)
_____ on [his][her] complaint against both defendants
(plaintiff)
and also for _____ on the counterclaim of _____
(plaintiff) (defendant
principal). However, you must reduce any damages of

In proportion to the degree of *[his][her]* own
(plaintiff)
negligence,

If the negligence of was of less degree
(defendant agent)
than the negligence of , then you should find for
(plaintiff)
on *[his][her]* counterclaim and also for
(defendant principal).
both defendants on the complaint of . However,
(plaintiff)
you must reduce any damages of in
(defendant principal)
proportion to the degree of negligence of .
(defendant agent)

If you should find that and were
(plaintiff) (defendant agent)
equally negligent or that neither was negligent, then
neither nor can recover in this
(plaintiff) (defendant principal)
case, and you should find against on *[his][her]*
(plaintiff)
complaint and against on *[his][her]*
(defendant principal)
counterclaim.

NOTE ON USE

Do not use this instruction when the case is submitted on interrogatories.

When AMI 301 is given, substitute "fault" for "negligence."

COMMENTS

This instruction is based on Ark. Code Ann. § 16-64-122.

Research References

West's Key Number Digest
Principal and Agent §194(1)

AMI 2105

**COMPARATIVE NEGLIGENCE OR FAULT—
COMPLAINT AGAINST PRINCIPAL AND AGENT—
COUNTERCLAIM BY BOTH DEFENDANTS**

If you should find that _____ was not negligent or
(plaintiff)
that [his][her] negligence was not a proximate cause
of the occurrence, then [he][she] is entitled to recover
the full amount of any damages you may find [he][she]
has sustained which were proximately caused by any
negligence of _____.
(defendant agent)

If you should find that _____ was not negli-
(defendant agent)
gent or that [his][her] negligence was not a proximate
cause of the occurrence, then both [he][she] and
_____ are entitled to recover the full amount of
(defendant principal)
any damages you may find they have sustained which
were proximately caused by any negligence of _____.
(plaintiff)

If you should find that the occurrence was proxi-
mately caused by negligence of both _____ and
(plaintiff)
_____, then you must compare the percentages
(defendant agent)
of the negligence of these two parties.

If the negligence of _____ was of less degree than
(plaintiff)
the negligence of _____, then you should find for
(defendant agent)
_____ on [his][her] complaint and also for _____ on
(plaintiff) (plaintiff)
the counterclaim of _____ and _____.
(defendant agent) (defendant principal)
However, you must reduce any damages of _____ in
(plaintiff)
proportion to the degree of [his][her] own negligence.

If the negligence of _____ was of less degree
(defendant agent)
than the negligence of _____, then you should find for
(plaintiff)
[him][her] and for _____ on their counterclaim
(defendant principal)
and also for them on the complaint of _____. However,
(plaintiff)
you must reduce any damages of both in proportion
to the degree of the negligence of _____.
(defendant agent)

If you should find that _____ and _____ were
(plaintiff) (defendant agent)
equally negligent or that neither was negligent, then
none of the parties can recover in this case, and you
should find against _____ on [his][her] complaint and
(plaintiff)
against _____ and _____ on their
(defendant agent) (defendant principal)
counterclaim.

NOTE ON USE

Do not use this instruction when the case is submitted on interrogatories.

When AMI 301 is given, substitute "fault" for "negligence."

COMMENT

This instruction is based on Ark. Code Ann. § 16-64-122.

Research References

West's Key Number Digest :
Principal and Agent ⇨194(1)

AMI 2106

**COMPARATIVE NEGLIGENCE OR FAULT—
COMPLAINT OF PRINCIPAL AND AGENT—
COUNTERCLAIM BY DEFENDANT**

If you should find that _____ was not negligent
(plaintiff agent)
or that [his][her] negligence was not a proximate
cause of the occurrence, then both _____ and
(plaintiff agent)
_____ are entitled to recover the full amount of
(plaintiff principal)
any damages you may find they have sustained which
were proximately caused by any negligence of _____.
(defendant)

If you should find that _____ was not negligent
(defendant)
or that [his][her] negligence was not a proximate
cause of the occurrence, then [he][she] is entitled to
recover the full amount of any damages you may find
[he][she] has sustained which were proximately
caused by any negligence of _____.
(plaintiff agent)

If you should find that the occurrence was proxi-
mately caused by negligence of both _____ and
(plaintiff agent)
_____, then you must compare the percentages of
(defendant)
the negligence of these two parties.

If the negligence of _____ was of less degree
(plaintiff agent)
than that of _____, then you should find for _____
(defendant) (plaintiff
agent) and _____ on their complaint and also for
(plaintiff principal)
them on the counterclaim of _____. However, you
(defendant)
must reduce any damages of both _____ and
(plaintiff principal)

_____ in proportion to the degree of the negligence
(plaintiff agent)
of _____
(plaintiff agent)

If the negligence of _____ was of less degree
(defendant)
than that of _____, then you should find for
(plaintiff agent)
_____ on [his][her] counterclaim and also for [him]
(defendant)
[her] on the complaint of both _____ and _____
(plaintiff principal) (plaintiff agent)
_____. However, you must reduce any damages of
(defendant)
_____ in proportion to the degree of [his][her] own
(defendant)
negligence.

If you should find that _____ and _____ were
(plaintiff agent) (defendant)
equally negligent or that neither was negligent, then
none of the parties can recover in this case, and you
should find against _____ and _____ on their
(plaintiff agent) (plaintiff principal)
complaint and against _____ on [his][her]
(defendant)
counterclaim.

NOTE ON USE

Do not use this instruction when the case is submitted on interrogatories.

When AMI 301 is given, substitute "fault" for "negligence."

COMMENT

This instruction is based on Ark. Code Ann. § 16-64-122.

Research References

West's Key Number Digest
Principal and Agent ¶194(1)

AMI 2107

**COMPARATIVE NEGLIGENCE OR FAULT—
COMPLAINT AND COUNTERCLAIM—COMPLAINT
OF PRINCIPAL AND AGENT—COUNTERCLAIM BY
PRINCIPAL AND AGENT**

If you should find that _____ was not negligent
(plaintiff agent)
or that [his][her] negligence was not a proximate
cause of the occurrence, then both _____ and
(plaintiff agent)
_____ are entitled to recover the full amount of
(plaintiff principal)
any damages you may find they have sustained which
were proximately caused by any negligence of _____
(defendant agent).

If you should find that _____ was not negli-
(defendant agent)
gent or that [his][her] negligence was not a proximate
cause of the occurrence, then both _____ and
(defendant agent)
_____ are entitled to recover the full amount of
(defendant principal)
any damages you may find they have sustained which
were proximately caused by any negligence of _____
(plaintiff agent).

If you should find that the occurrence was proxi-
mately caused by negligence of both _____ and
(plaintiff agent)
_____, then you must compare the percentages
(defendant agent)
of the negligence of these two parties.

If the negligence of _____ was of less degree
(plaintiff agent)
than the negligence of _____, then you should
(defendant agent)

COMMENT

This instruction is based on Ark. Code Ann. § 16-64-122.

Research References

West's Key Number Digest

Principal and Agent ☞194(1)

AMI 2108

**COMPARATIVE NEGLIGENCE OR FAULT—
MULTIPLE CLAIMS—NO IMPUTED
NEGLECTENCE—NO JOINT TORTFEASORS**

If you should find that a party claiming damages was free of any negligence which was a proximate cause of the occurrence, then that party is entitled to recover the full amount of any damages you may find *[he][she]* has sustained which were proximately caused by any negligence of *[the] [any]* party *[he][she]* is suing.

If you should find that the occurrence was proximately caused by negligence on the part of a party claiming damages and also by negligence on the part of *[the] [any]* party from whom *[he][she]* seeks to recover, then you must compare the percentages of their negligence.

If the negligence of a party claiming damages was of less degree than the negligence of *[the] [any]* party from whom *[he][she]* seeks to recover, then *[he][she]* is entitled to recover any damages which you may find *[he][she]* has sustained as a result of the occurrence after you have reduced them in proportion to the degree of *[his][her]* own negligence.

On the other hand, if the negligence of a party claiming damages was equal to or greater in degree than the negligence of *[the] [any]* party from whom *[he][she]* seeks to recover, or if *[the] [any]* party from whom *[he][she]* seeks to recover was not negligent, then the party claiming damages is not entitled to recover from that party.

NOTE ON USE

Do not use this instruction when the case is submitted on interrogatories.

When AMI 301 is given, substitute “fault” for “negligence.”

In a multiple claim case involving imputed negligence or fault use AMI 2109.

In a multiple claim case involving joint tortfeasors use AMI 2110.

COMMENT

This instruction is based on Ark. Code Ann. § 16-64-122.

If the cause of action accrued after March 25, 2003, this instruction might not be applicable. See Comment to AMI 2110.

Research References

West's Key Number Digest
Negligence \S 1746

Legal Encyclopedias
C.J.S., Negligence $\S\S$ 995, 1005, 1010, 1018 to 1019

AMI 2109

**COMPARATIVE NEGLIGENCE OR FAULT—
MULTIPLE CLAIMS—IMPUTED NEGLIGENCE**

If you should find that a party claiming damages was not chargeable with negligence which was a proximate cause of the occurrence, then that party is entitled to recover the full amount of any damages you may find *[he][she]* has sustained which were proximately caused by any negligence chargeable to *[the] [any]* party *[he][she]* is suing.

If you should find that the occurrence was proximately caused by negligence chargeable to a party claiming damages and also by negligence chargeable to *[the] [any]* party from whom *[he][she]* seeks to recover, then you must compare the percentages of their negligence.

If the negligence chargeable to a party claiming damages was of less degree than the negligence chargeable to *[the] [any]* party from whom *[he][she]* seeks to recover, then *[he][she]* is entitled to recover any damages which you may find *[he][she]* has sustained as a result of the occurrence after you have reduced them in proportion to the degree of *[his][her]* own negligence.

On the other hand, if the negligence chargeable to a party claiming damages was equal to or greater in degree than the negligence chargeable to *[the] [any]* party from whom *[he][she]* seeks to recover, or if *[the] [any]* party from whom *[he][she]* seeks to recover was not negligent, then the party claiming damages is not entitled to recover from that party.

NOTE ON USE

Do not use this instruction when the case is submitted on interrogatories.

When AMI 301 is given, substitute "fault" for "negligence."

In a multiple claim case involving joint tortfeasors use AMI 2110.

COMMENT

This instruction is based on Ark. Code Ann. § 16-64-122.

If the cause of action accrued after March 25, 2003, this instruction might not be applicable. *See* Comment to AMI 2110.

Research References

West's Key Number Digest
Negligence ¶1746

Legal Encyclopedias
C.J.S., Negligence §§ 995, 1005, 1010, 1018 to 1019

AMI 2110**COMPARATIVE NEGLIGENCE OR FAULT—
MULTIPLE CLAIMS—JOINT TORTFEASORS—NO
IMPUTED NEGLIGENCE**

After the passage of the Civil Justice Reform Act of 2003, and particularly Ark. Code Ann. § 16-55-201, which abolished joint and several liability in favor of several liability, the Committee believes that in actions for personal injury, medical injury, property damage, or wrongful death, claims against multiple defendants should not be submitted on general verdicts. AMI 2110 has consequently been removed from the Arkansas Model Instructions. For an analysis of the current law governing tort claims against multiple defendants, see the part entitled “Use of AMI” at the beginning of this manual.

CHAPTER 22

DAMAGES

Table of Instructions

AMI

- 2201. Measure of Damages—General Instruction.
- 2202. Measure of Damages—The Nature, Extent, Duration, and Permanency of the Injury.
- 2203. Measure of Damages—Aggravation of Pre-existing Condition.
- 2204. Measure of Damages—Medical Expense—Past and Future.
- 2205. Measure of Damages—Pain, Suffering, and Mental Anguish—Past and Future.
- 2206. Measure of Damages—Loss of Earnings or Profits—Past and Future.
- 2207. Measure of Damages—Loss of Earning Capacity.
- 2208. Measure of Damages—Scars, Disfigurement, and Visible Results of Injury.
- 2209. Measure of Damages—Caretaking Expense—Past and Future.
- 2210. Measure of Damages—Damage to Vehicle.
- 2211. Measure of Damages—Loss of Consortium.
- 2212. Measure of Damages—Parent's Cause of Action—Injury to Child.
- 2213. Measure of Damages—Minor Plaintiff's Cause of Action.
- 2214. Mitigation of Damages—Personal Injuries.
- 2215. Measure of Damages—Collateral Sources.
- 2216. Measure of Damages—Wrongful Death—Cause of Action.
- 2217. Measure of Damages—Wrongful Death—Unmarried Minor.
- 2218. Punitive Damages.
- 2218A. Punitive Damages—Out-of-state Conduct and Harm to Non-Parties—Cautionary Instructions.
- 2219. Purpose of Mortality Tables.
- 2220. Present Value—Definition.
- 2221. Fair Market Value—Definition.
- 2222. Measure of Damages—Damage to Property—General Instruction.
- 2223. Measure of Damages—Damage to Real Property—Permanent.
- 2224. Measure of Damages—Damage to Real Property—Temporary or Repairable.
- 2225. Measure of Damages—Damage to Real Property—Destruction of Improvements.
- 2226. Measure of Damages—Damage to Crops.
- 2226A. Measure of Damages—Damage to Trees or Growing Timber.
- 2227. Measure of Damages—Damage to Personal Property.

AMI

2228. Measure of Damages—Damage to Personal Property—No Salvage.
 2229. Measure of Damages—Damage to Personal Property—Clothing or Personal Effects.
 2230. Mitigation of Damages—Real and Personal Property.
 2231. Measure of Damages—Malicious Prosecution.

 AMI 2201

 MEASURE OF DAMAGES—GENERAL
 INSTRUCTION

[If you decide for _____ on the question of liability (against any party *(he)* *(she)* is suing)] [If an interrogatory requires you to assess the damages of _____], you must then fix the amount of money which will reasonably and fairly compensate *[him]* *[her]* for any of the following _____ elements of damage sustained [which you find were proximately caused by the *(negligence)* *(or)* *(fault)* of _____ (or _____)]:

[Here insert the elements.]

[First:]

[Second:]

[Third:]

[etc.:]

Whether any of these _____ elements of damage
 (number)
 has been proved by the evidence is for you to determine.

NOTE ON USE

Insert in the spaces marked “Number” the total number of appropriate clauses selected from AMI 2202 through 2210 and AMI 2223 through 2229. However, AMI 2203 is not a separate element but must be combined with the appropriate clause selected from AMI 2202.

This instruction cannot be given in the form shown on this page. It must be completed by selecting the appropriate elements of damage from AMI 2202 through 2210 and AMI 2223 through 2229. The selections should reflect the relevant items of damage and should be inserted between the two paragraphs of this instruction.

If more than one party is entitled to present an instruction on damages, this instruction with proper elements inserted should be repeated for each. If only one element of damage is involved, make appropriate modifications.

When the case is submitted on interrogatories that cover the question of proximate cause—such as under AMI 307 and 307A (fault allocation) or as suggested in Chapter 36, Illustrative Sets of Instructions, Part II—the final bracketed clause in the first paragraph referring to proximate cause should be omitted.

If a claim involves property damage only, use AMI 2222.

Do not use this instruction when AMI 2211, 2212, 2213, 2216 or 2217 is appropriate.

COMMENT

The law in Arkansas is unsettled as to whether purely economic losses are recoverable in a negligence action. In *Bayer CropScience v. Schafer*, 2011 Ark. 518, at 15–16, the court held that it was unnecessary to resolve the question, but it affirmed the award of economic loss damages because the plaintiff rice farmers also suffered some damages to their lands, crops, and equipment, although they did not seek compensation for that harm.

Damages for economic loss may be recoverable under strict products liability in the absence of any personal injury or any damage to property other than the product, provided that the defective product is unreasonably dangerous such that it poses an actual danger to persons or property. See *Berkeley Pump Co. v. Reed-Joseph Land Co.*, 279 Ark. 384, 390–91, 653 S.W.2d 128, 131 (1987) and Comment to AMI 1008 (citing cases).

Research References

West's Key Number Digest
Damages ⇨210(1)

AMI 2202

MEASURE OF DAMAGES—THE NATURE, EXTENT, DURATION, AND PERMANENCY OF THE INJURY

- A. The nature, extent, and duration of any injury.**
- B. The nature, extent, duration, and permanency of any injury.**
- C. The nature, extent, and duration of any injury and whether it is temporary or permanent.**

NOTE ON USE

- A. Should be used when there is no evidence of permanency.
- B. Should be used when permanency is undisputed.
- C. Should be used when permanency is disputed.

The appropriate clause is to be inserted between the two paragraphs of AMI 2201 when the evidence justifies its use.

COMMENT

This instruction properly defines separate elements of damages and not factors to be considered in connection with other damages instructions. The court held it to be reversible error to refuse to give the instruction as written in *Adkins v. Kelley*, 244 Ark. 199, 424 S.W.2d 373 (1968).

A permanent injury is one that deprives a plaintiff of his right to live his life in comfort and ease without added inconvenience or diminution of physical vigor, even if there is no accompanying pecuniary loss or loss of earning capacity. *Id.*, 244 Ark. at 204, 424 S.W.2d at 375, quoting *Henry Woods, Earnings and Earning Capacity as Elements of Damage in Personal Injury Litigation*, 18 Ark. L. Rev. 304 (1965). Thus, a plaintiff theoretically could have a permanent injury without loss of earning capacity (e.g., if the plaintiff had a pre-injury condition rendering him or her unemployable), but must have a permanent injury to incur loss of earning capacity. *Wheeler v. Bennett*, 312 Ark. 411, 849 S.W.2d 952 (1993).

The Arkansas Supreme Court has stated that permanency must be proved with reasonable certainty, e.g., *Welter v. Curry*, 260 Ark. 287,

539 S.W.2d 264 (1976), but that the seriousness of the injury itself may establish permanency, e.g., *Bailey v. Bradford*, 244 Ark. 8, 423 S.W.2d 565 (1968); *Duckworth v. Stephens*, 182 Ark. 161, 30 S.W.2d 840 (1930). The jury may rely on lay testimony without expert corroboration in finding permanency. *East Texas Motor Freight Lines, Inc. v. Freeman*, 289 Ark. 539, 545, 713 S.W.2d 456, 460 (1986).

The court in *East Texas Motor Freight Lines, Inc.*, observed that “[n]o hard and fast rule exists by which to test the permanency of injuries and to a degree each case must be examined on its own.” *Id.* The court held it error to give version [C] of the instruction (via AMI 2213) in *Welter*, despite serious injury to plaintiff, in light of the treating physician’s testimony that, if plaintiff followed the prescribed rehabilitation regimen, he would have absolutely normal use of his leg in five or six years. *Welter, supra*, 260 Ark. at 292, 539 S.W.2d at 268. In *Bailey* the court held it proper to give the instruction based on testimony concerning the symptoms of plaintiff’s brain injury. *Bailey, supra*, 244 Ark. at 9, 423 S.W.2d at 566, citing *Duckworth, supra* (finding sufficient evidence of permanency in testimony regarding symptoms of brain injury). See also *Belford v. Humphrey*, 244 Ark. 211, 214–15, 424 S.W.2d 526, 529 (1968) (noting gray area between the two extremes of cases involving injuries subjective in character not plain to the layman and cases involving manifestly objective injuries such as a severed limb; and holding that evidence of persistence of whiplash symptoms, personality change, restricted movement, difficulty finding employment, and continued use of muscle relaxants sufficient to submit issue of permanency to the jury); *East Texas Motor Freight Lines, Inc. v. Freeman, supra*, 289 Ark. at 545, 713 S.W.2d at 460 (ruling that issue of permanency properly submitted to jury in a marginal case of mainly emotional injuries, based on testimony of head injury, nausea, continuing severe headaches, and persistent anxiety symptoms); *Handy Dan Home Improvement Center, Inc.-Arkansas v. Peters*, 286 Ark. 102, 689 S.W.2d 551 (1985) (holding it proper to give permanency instruction based on physicians’ testimony regarding nature of injury). The absence of a numerical impairment rating does not preclude recovery of damages for permanent injuries. *Wheeler v. Bennett, supra*, 312 Ark. at 417, 849 S.W.2d at 955–56.

Research References

West’s Key Number Digest
Damages ⇨216

Legal Encyclopedias
C.J.S., Damages §§ 426 to 427, 434 to 443

AMI 2203

MEASURE OF DAMAGES—AGGRAVATION OF PRE-EXISTING CONDITION

In this regard you should consider the full extent of any injury sustained, even though the degree of injury is found by you to have proximately resulted from the aggravation of a *[condition]* *[disease]* that already existed and that predisposed _____ to injury to a greater extent than another person. [However, you may not award *[him]**[her]* damages for any (*pain*) (*mental anguish*) (*disability*) (_____)]
(other appropriate element of damage)

which *[he]**[she]* would have suffered even though the accident had not occurred.]

NOTE ON USE

This clause is to be inserted between the two paragraphs of AMI 2201 when the evidence justifies its use and should immediately follow the giving of AMI 2202.

Do not use the bracketed final sentence unless there is evidence that the claimant would have suffered pain, disability, mental anguish, etc., even though the accident had not occurred.

COMMENT

This instruction is based on the law as stated in *Owen v. Dix*, 210 Ark. 562, 196 S.W.2d 913 (1946) (collecting cases); was mentioned with approval in *Continental Southern Lines, Inc. v. Moses*, 239 Ark. 905, 907, 395 S.W.2d 20, 21 (1965) (quoting *Owen* as a clear and concise statement of the law); and was cited as the correct statement of the law in *Clawson v. Rye*, 281 Ark. 8, 11, 661 S.W.2d 354, 357 (1983). The rule reflected in this instruction, known as the eggshell plaintiff rule, embraces definite aspects of proximate causation, and it is reversible error not to give it if there is substantial evidence of aggravation of an existing condition. *Primm v. U.S. Fid. & Guar. Ins. Corp.*, 324 Ark. 409, 413–14, 922 S.W.2d 319, 321 (1996). For the background to this instruction, see *Lockhart v. O'Hara*, 380 F. Supp. 379 (W.D. Ark. 1974). See generally JACOB A. STEIN, STEIN ON PERSONAL INJURY DAMAGES § 11:1 (3d ed.) (providing overview of rule).

It was not error to refuse to give the instruction when the decisive

medical testimony related the entirety of the plaintiff's complaints to the current accident and there was no evidence of aggravation of an injury from a previous accident, even though a physician testified hypothetically that existing injuries could render a person more susceptible to further injury. *Simpson v. Hurt*, 294 Ark. 41, 43, 740 S.W.2d 618, 619 (1987). See also *Coleman v. Cathey*, 263 Ark. 450, 454, 565 S.W.2d 426, 429 (1978) (holding it was not error to refuse to give instruction in eye-injury case based on evidence of nearsightedness as only alleged pre-existing condition). The Eighth Circuit upheld the trial court's refusal to give the bracketed portion of this instruction absent substantial evidence that plaintiff would have suffered damages even had the accident not occurred in *Kudabeck v. Kroger Co.*, 338 F.3d 856, 864 (8th Cir. 2003).

Arkansas has not explicitly ruled on the applicability of this instruction in medical malpractice cases. In *Bockman v. Butler*, 226 Ark. 159, 163, 288 S.W.2d 597, 599 (1956) (*Bockman II*), appeal after remand from *Bockman v. Butler*, 224 Ark. 125, 271 S.W.2d 918 (1954) (*Bockman I*), the court stated that a physician who committed malpractice is not chargeable for pain, suffering, or anguish that arose because of the original ailment but is chargeable only for the pain, suffering, anguish, and expenses that naturally follow from the malpractice. In upholding the verdict, the court concluded that because of the defendant's negligence one boy suffered much more and had a long and hard recovery and that, but for defendant's negligence, the other boy would not have died. *Id.* at 163, 288 S.W.2d at 599. The jury instructions were not challenged in *Bockman II*. The challenged jury instructions in *Bockman I* involved the general definition of proximate cause. The opinion does not mention eggshell plaintiff instructions. The *Bockman I* court did instruct the jury that plaintiffs had the burden of proving that the defendant's negligence "was the proximate cause of the unnecessary and prolonged suffering, if any" of the boys, but that portion of the instruction was not challenged on appeal.

Research References

West's Key Number Digest
Damages ¶216

Legal Encyclopedias
C.J.S., Damages §§ 426 to 427, 434 to 443

AMI 2204

**MEASURE OF DAMAGES—MEDICAL EXPENSE—
PAST AND FUTURE**

The reasonable expense of any necessary medical care, treatment and services received, [including (transportation) (and) (board) (and) (lodging) expenses necessarily incurred in securing such care, treatment, or services] [and the present value of such expense reasonably certain to be required in the future].

NOTE ON USE

This clause is to be inserted between the two paragraphs of AMI 2201 when the evidence justifies its use.

COMMENT

The elements of damages reflected in this instruction were recognized in *Blissett v. Frisby*, 249 Ark. 235, 458 S.W.2d 735 (1970).

Past medical expenses must be affirmatively proved to justify their inclusion in the instruction on damages. *Hinkle v. Perry*, 296 Ark. 114, 117, 752 S.W.2d 267, 268 (1988) (holding it was not error to refuse to give this instruction regarding past transportation costs when the only evidence was the number of trips and the approximate distance traveled, but not the actual cost). *See also* *Auto Transport v. May*, 224 Ark. 704, 712, 275 S.W.2d 767, 771 (1955) (reducing damage award for past medical expenses to only that amount for which there was testimony).

A plaintiff seeking to recover medical expenses must prove that those expenses were reasonable and necessary. *Bell v. Stafford*, 284 Ark. 196, 198, 680 S.W.2d 700, 702 (1984) (holding evidence of expenses incurred many months after accident improperly admitted because there was no testimony to establish a causal relationship to accident); *Arthur v. Zearley*, 337 Ark. 125, 142, 992 S.W.2d 67, 77 (1999) (ruling that trial court erred in giving instruction absent any evidence that medical expenses were reasonably certain to be incurred in future; plaintiff had incurred no medical expenses for three years preceding trial). For a discussion of that standard in the context of a dispute about the propriety of the treatment, *see* *Ponder v. Cartmell*, 301 Ark. 409, 784 S.W.2d 758 (1990). Medical testimony is not always necessary to prove reasonableness and necessity, which may be established in some cases by testimony of a non-expert witness such as the injured

party. *Kay v. Martin*, 300 Ark. 193, 196, 777 S.W.2d 859, 861 (1989) (upholding submission of medical bills to jury upon plaintiff's testimony explaining each item).

Future medical expenses do not require the same specificity as past medical expenses and may be established by a showing of a degree of medical certainty of future medical expenses. *West Union v. Vostatek*, 302 Ark. 219, 222, 788 S.W.2d 952, 954 (1990) (upholding submission of instruction for future medical expenses based on medical testimony regarding injuries and that surgery might well be required in the future), *quoting* *Williams v. Gates*, 275 Ark. 381, 630 S.W.2d 34 (1982), and citing this instruction. The court has upheld an award of future medical expenses based on a history of expenses that had accrued by the trial, the seriousness of the injury, and a degree of medical certainty as to the need for future medication. *Bill Davis Trucking, Inc. v. Prysock*, 301 Ark. 387, 391–92, 784 S.W.2d 755, 755–58 (1990). For other cases applying these principles, *see* *Willson Safety Products v. Eschenbrenner*, 302 Ark. 228, 233, 788 S.W.2d 729, 733 (1990) (upholding submission of issue of future medical expenses to jury based on evidence of seriousness of injury, need for continuing treatment, and possible benefit from experimental surgical procedure); *Haney v. Noble*, 250 Ark. 557, 559, 466 S.W.2d 467, 468–69 (1971) (upholding the giving of this instruction upon proof of past expenses, 10% permanent disability, and medical testimony concerning continuing need for treatment). *See also* *Holmes v. Hollingsworth*, 234 Ark. 347, 349–50, 352 S.W.2d 96, 97–98 (1961) (upholding the giving of a future medical expense instruction based on testimony of nature of injuries, past treatment, and need for future treatment; rejecting argument that husband's obligation to provide wife's necessities of life precluded her recovery of medical expenses).

Before enactment of the medical-cost provision of the Civil Justice Reform Act, § 15(b), Act 649 of 2003, codified at Ark. Code Ann. § 16-55-212(b), a plaintiff seeking recovery for medical expenses could invoke the collateral source rule to exclude evidence that the plaintiff had actually paid less than the full amount of those expenses (e.g., because the provider had discounted the bill or some portion had been covered by another source). *Montgomery Ward & Co., Inc. v. Anderson*, 334 Ark. 561, 564–68, 976 S.W.2d 382, 383–85 (1998) (excluding under collateral source rule evidence of an agreement between the plaintiff and a hospital to discount the hospital bill by 50%). The medical-cost provision of Act 649 apparently sought to overrule *Montgomery Ward* by limiting evidence of damages for costs of necessary medical care, treatment, or services only to those costs actually paid by, or on behalf of, the plaintiff or which remain unpaid and for which the plaintiff or any third party shall be legally responsible. Ark. Acts 2003, No. 649 § 15(a), Ark. Code Ann. § 16-55-212(b). In *Johnson v. Rockwell Automation, Inc.*, 2009 Ark. 241, at 9–10, 308 S.W.3d 135, 141–42 (2009), however, the court held the medical-cost provision of the Civil Justice Reform Act unconstitutional as a violation of the separation of powers principle embodied in Article 4, § 2 and Amendment 80, § 3 of the Arkansas Con-

stitution because it purported to prescribe a rule of evidence. Presumably, *Johnson* also applies to § 19(b) of the Act, Ark. Code Ann. § 16-114-208(a), the medical malpractice version of the medical-cost provision.

Research References

West's Key Number Digest 41 DAMAGES 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Legal Encyclopedias
C.J.S., Damages §§ 426 to 427, 434 to 443

AMI 2205

**MEASURE OF DAMAGES—PAIN, SUFFERING, AND
MENTAL ANGUISH—PAST AND FUTURE**

**Any pain and suffering [and mental anguish]
experienced in the past [and reasonably certain to be
experienced in the future].**

NOTE ON USE

This clause is to be inserted between the two paragraphs of AMI 2201 when the evidence justifies its use.

COMMENT

This instruction states a traditional element of damages. *See generally* Dan B. Dobbs, *THE LAW OF TORTS* 1050–52 (2000) (describing entitlement to recovery and forms of suffering included). Pain and suffering may be inferred from the serious nature of the injury. *Scott-Burr Stores Corp. v. Foster*, 197 Ark. 232, 122 S.W.2d 165 (1938). There is no definite and satisfactory rule to measure compensation for pain and suffering and the amount of damages must depend on the circumstances of each particular case. *Hamby v. Haskins*, 275 Ark. 385, 390, 630 S.W.2d 37, 40 (1982). It is not an abuse of the trial court's discretion to permit counsel to argue for a per diem basis for pain, suffering, and mental anguish, *Vanlandingham v. Gartman*, 236 Ark. 504, 506–08, 367 S.W.2d 111, 113–14 (1963); but Golden Rule arguments, in which jurors are asked to determine the amount of damages by putting themselves in plaintiff's position, are not allowed in Arkansas. *Missouri Pac. R. Co. v. McDaniel*, 252 Ark. 586, 588–90, 483 S.W.2d 569, 571 (1972); *Midwest Buslines, Inc. v. Johnson*, 291 Ark. 304, 307–08, 724 S.W.2d 453, 455 (1987).

Evidence of future pain and suffering must be established with reasonable certainty and not left to speculation or conjecture by the jury. *Handy Dan Home Improvement Center, Inc.-Arkansas v. Peters*, 286 Ark. 102, 104, 689 S.W.2d 551, 552 (1985). Lay testimony may meet that test even in the absence of expert corroboration. *Bailey v. Bradford*, 244 Ark. 8, 9–10, 423 S.W.2d 565, 566–67 (1968). Damages for future pain and suffering are not reduced to present value. Dobbs, *supra*, at 1057; *Jackson v. United States*, 526 F. Supp 1149, 1153–54 (E.D. Ark. 1981) (applying Arkansas law), *aff'd*, 696 F.2d 999 (8th Cir. 1982).

In an action based on negligence, plaintiff may be entitled to recover damages for mental anguish as well as for physical pain and suffering; and mental anguish may be inferred from the degree of physical

pain. *Chicago, R.I. & P. Ry. Co. v. Caple*, 207 Ark. 52, 179 S.W.2d 151 (1944). Humiliation and embarrassment are included within the damage element of mental anguish, and it is error to instruct the jury that they are separate elements of recovery. *Yam's Inc. v. Moore*, 319 Ark. 111, 116-17, 890 S.W.2d 246, 249 (1994); *Bruns v. Bruns*, 290 Ark. 347, 350, 719 S.W.2d 691, 693 (1986) (holding it error to so instruct the jury and noting the *Per Curiam* Order of April 19, 1965). Plaintiff may recover for mental anguish suffered in the past and reasonably certain to be experienced in the future. *Bill Davis Trucking, Inc. v. Prysock*, 301 Ark. 387, 784 S.W.2d 755 (1990). In intentional tort cases, recovery for mental anguish does not require physical harm. *Midwest Buslines, Inc. v. Johnson*, 291 Ark. 304, 305, 724 S.W.2d 453, 454 (1987).

Research References

West's Key Number Digest
Damages \Leftrightarrow 216(4), 216(7)
Legal Encyclopedias
C.J.S., Damages §§ 426 to 427, 434 to 443

AMI 2206

MEASURE OF DAMAGES—LOSS OF EARNINGS OR PROFITS—PAST AND FUTURE

The value of any [earnings] [profits] [salary] [working time] lost [and the present value of any (earnings) (profits) (salary) (working time) reasonably certain to be lost in the future].

NOTE ON USE

This clause is to be inserted between the two paragraphs of AMI 2201 when the evidence justifies its use.

Do not use the bracketed reference to future losses when AMI 2207 is given.

COMMENT

The court cited AMI 2206 as reflecting “settled law” in *Ishie*, 302 Ark. at 114, 788 S.W.2d at 226 (reversing the trial court for giving AMI 2206 absent adequate evidence of lost past and future profits).

Loss of future earnings and loss of earning capacity are separate elements of damages. *Cates v. Brown*, 278 Ark. 242, 245, 645 S.W.2d 658, 660 (1983) (referring to AMI on damages with approval). Loss of future earnings requires proof, with reasonable certainty, of (1) the amount of wages lost for some determinable period and (2) the future period over which wages will be lost. *Id.*, 645 S.W.2d at 660; *Arthur v. Zearley*, 337 Ark. 125, 143, 992 S.W.2d 67, 78 (1999). Thus, where there is proof that the plaintiff, at the time of the trial, is still unable to earn as much as he did before he was injured, an instruction on the loss of future earnings is proper. *Check v. Meredith*, 243 Ark. 498, 500, 420 S.W.2d 866, 867 (1967). Testimony by the plaintiff, his wife, and his employer regarding plaintiff's earnings, unsupported by documentary proof of earnings, was held to be sufficient to support the trial court's giving of this instruction in *Davis v. Davis*, 313 Ark. 549, 554–55, 856 S.W.2d 284, 286–87 (1993) (noting that the test is “reasonable certainty,” not “exactness,” and distinguishing *Swenson v. Hampton*, 244 Ark. 104, 424 S.W.2d 165 (1968)).

The gravamen of loss of future earning capacity, by contrast, is the loss of the ability to earn in the future resulting from a permanent injury, proof of which loss does not require the same specificity or detail as does proof of loss of future wages, nor does it require proof of specific pecuniary loss. *Cates*, 278 Ark. at 245, 645 S.W.2d at 660 (citing *Henry*

Woods, *Earnings Capacity as Elements of Damage in Personal Injury Litigation*, 18 Ark. L. Rev. 304 (1965) and AMI 2207). The evidence in a particular case might support an award for either element; but, because of the danger of double recovery, it is error to disregard the Note on Use and give the lost future earnings portion of this instruction along with AMI 2207. *Coleman v. Cathey*, 263 Ark. 450, 454, 565 S.W.2d 426, 429 (1978).

The measure of damages for lost wages is the gross amount of those wages and is not to be reduced by taxes, retirement, Social Security contributions, or other withholdings. *Cates*, 278 Ark. at 247–48, 645 S.W.2d at 661–62. It is error to admit evidence of such withholdings. *Id.*, 645 S.W.2d at 661–62. The plaintiff may recover as damages lost leave (whether vacation or sick time). *Freeman v. Reeves*, 241 Ark. 867, 877, 410 S.W.2d 740, 746 (1967) (*citing* *Swindle v. Thornton*, 229 Ark. 437, 316 S.W.2d 202 (1958)).

Lost profits are a recoverable element of damages in both tort and contract actions when proved with reasonable certainty. *Ishie*, 302 Ark. at 114, 788 S.W.2d at 226; *Boellner v. Clinical Study Centers, LLC*, 2011 Ark. 83, 378 S.W.3d 745 (2011). Lost net profits, not lost gross profits, are recoverable. *Id.* A party seeking lost profits must present a reasonably complete set of figures to the fact-finder and should not leave it to speculate as to whether there could have been any profits. *Boellner*, 2011 Ark. 83, 378 S.W.3d 745. Less certainty is required to calculate the amount of lost profits than is required to establish that such profits were lost and are recoverable. *Reed v. Williams*, 247 Ark. 314, 445 S.W.2d 90 (1969). In 2017, the Arkansas General Assembly, noting in its legislative findings that Arkansas courts “may have perceived” Arkansas as a “new business rule” state with respect to the availability of lost profit damages for a newly established business, amended Ark. Code Ann. § 16-64-131 to clarify that “there is no absolute denial of damages for lost profits to a newly established business” and that such damages are potentially available to all businesses based on the same standard of proof. Act 1103 of 2017. In calculating damages, neither expert testimony nor specificity is required. In *Agracat, Inc. v. AFS-NWA, LLC*, the court held that while testimony from an expert witness or other officer would have reduced the difficulty of determining the amount of damages, nevertheless “[d]amages should not be deemed unrecoverable simply because they are problematic to ascertain.” 2010 Ark. App. 458, at 7. Further, the court clarified: “Arkansas law has never insisted on exactness of proof in determining damages, and if it is reasonably certain that some loss occurred, it is enough that damages can be stated only approximately.” *Id.*

It was not an abuse of discretion for the trial court to give AMI 2206 on a claim for breach of fiduciary duty, as opposed to a claim for breach of contract. *Sealing Devices, Inc. v. McKinney*, 2009 Ark. App. 412, at 3–6, 321 S.W.3d 270, 272–73 (distinguishing *Interstate Oil & Supply Co. v. Troutman Oil Co.*, 334 Ark. 1, 972 S.W.2d 941 (1998)).

Research References

West's Key Number Digest
Damages \S 216(8)

Legal Encyclopedias
C.J.S., Damages \S 441, 443

AMI 2207

**MEASURE OF DAMAGES—LOSS OF EARNING
CAPACITY**

The present value of any loss of ability to earn in the future.

NOTE ON USE

This clause is to be inserted between the two paragraphs of AMI 2201 when the evidence justifies its use.

Do not use this instruction when the bracketed material of AMI 2206 relating to future losses, is used.

COMMENT

Damages for loss of earning capacity may be recovered only upon proof that an injury is permanent. *Wheeler v. Bennett*, 312 Ark. 411, 849 S.W.2d 952 (1993). A permanent injury is one that deprives the plaintiff of his right to live in comfort and ease without added inconvenience or diminution of physical vigor. *Adkins v. Kelly*, 244 Ark. 199, 424 S.W.2d 373 (1965); *Wheeler, supra*. Loss of earning capacity is the present value of the loss of ability to earn in the future, however, and is a separate element of damages from permanency of injury. *Arthur v. Zearley*, 337 Ark. 125, 992 S.W.2d 67 (1999).

Loss of earning capacity differs from loss of income since there may be a loss of past and future income with no loss of earning capacity. Conversely, there may be a loss of earning capacity with no loss of past or present income. *Hogan v. Hill*, 229 Ark. 758, 318 S.W.2d 580 (1958); *Britt Trucking Co. v. Ringgold*, 209 Ark. 769, 192 S.W.2d 532 (1946).

Proof of loss of earning capacity does not require the same specificity or detail as does proof of loss of future wages. *Arthur, supra*.

If there is proof of permanent disability this element of damages may be submitted to the jury even in the absence of specific evidence of pecuniary loss due to inability to earn in the future. *Gipson v. Garrison*, 308 Ark. 344, 824 S.W.2d 829 (1992).

In the absence of direct proof of the value of the diminished capabilities, the probable diminution of earning capacity may be inferred from the nature of the injuries. *Bill Davis Trucking, Inc. v. Prysock*, 301 Ark. 387, 784 S.W.2d 755 (1990).

A numerical "impairment rating" is not essential to recovering for loss of earning capacity. *Wheeler, supra*.

For a discussion of the distinction between loss of future earnings and loss of future earning capacity, see *Cates v. Brown*, 278 Ark. 242, 645 S.W. 2d 658 (1983).

Research References

West's Key Number Digest
Damages ⇨216(8)

Legal Encyclopedias
C.J.S., Damages §§ 426 to 427, 434 to 443

AMI 2208

**MEASURE OF DAMAGES—SCARS,
DISFIGUREMENT, AND VISIBLE RESULTS OF
INJURY**

**Any [scars] [and] [disfigurement] [and] [visible
results of [his][her] injury].**

NOTE ON USE

This clause is to be inserted between the two paragraphs of AMI 2201 when the evidence justifies its use.

COMMENT

This instruction properly defines a separate element of damage and not a factor to be considered in connection with plaintiff's embarrassment and mental anguish. *Matthews v. Rodgers*, 279 Ark. 328, 651 S.W.2d 453 (1983). The refusal to give it as written was held to be reversible error in *Adkins v. Kelley*, 244 Ark. 199, 424 S.W.2d 373 (1968).

This instruction is appropriate when there is evidence of deformity. Evidence of humiliation is not necessary. *Butler Mfg. Co. v. Hughes*, 292 Ark. 198, 729 S.W.2d 142 (1987), *reh'g denied*, 292 Ark. 198, 731 S.W.2d 214.

The comment to this instruction was cited in *Jackson v. United States*, 526 F. Supp. 1149 (E.D. Ark. 1981), *aff'd*, 696 F.2d 999 (8th Cir. 1982).

Research References

West's Key Number Digest
Damages Ⓒ216(6)

Legal Encyclopedias
C.J.S., Damages §§ 426 to 427, 434 to 443

AMI 2209

**MEASURE OF DAMAGES—CARETAKING
EXPENSE—PAST AND FUTURE**

The reasonable expense of any necessary help in [his][her] home, which has been required as a result of [his][her] injury [and the present value of such expense reasonably certain to be required in the future].

NOTE ON USE

This clause is to be inserted between the paragraphs of AMI 2201 when the evidence justifies its use.

COMMENT

The recovery should compensate for the increased expense of living occasioned by the injury where, to maintain himself in the future, the injured must hire someone else to take care of him. *Perkins Oil Co. of Del. v. Fitzgerald*, 197 Ark. 14, 121 S.W.2d 877 (1938).

One who is injured is entitled to the reasonable value of caretaking services even where the services are provided by an unpaid family member. *Jackson v. United States*, 526 F. Supp. 1149 (E.D. Ark. 1981), *aff'd*, 696 F.2d 999 (8th Cir. 1982).

Research References

West's Key Number Digest
Damages ¶216(9)

Legal Encyclopedias
C.J.S., Damages §§ 426 to 427, 434 to 443

AMI 2210

MEASURE OF DAMAGES—DAMAGE TO VEHICLE

The difference in the fair market value of *[his][her]* *[automobile]* *[truck]* immediately before and immediately after the occurrence [plus a reasonable amount for loss of use]. [In determining any difference in market value, you may take into consideration the reasonable cost of repairs.]

NOTE ON USE

This clause is to be inserted between the two paragraphs of AMI 2201 when the evidence justifies its use.

Use the bracketed matter at the end of the first sentence when there is evidence of damages for loss of use.

Use bracketed last sentence only when there is evidence of cost of repairs.

COMMENT

This instruction is based on Ark. Code Ann. § 27-53-401.

Damages for loss of use for a reasonable time are recoverable even though the vehicle is a total loss. *Fryar v. Sanders*, 301 Ark. 379, 784 S.W.2d 168 (1990).

Testimony of the value of the vehicle before and after the occurrence is sufficient to enable the jury to determine the amount of damages to it. *Ishie v. Kelly*, 302 Ark. 112, 788 S.W.2d 225 (1990).

Where the vehicle is not a total loss, the difference in fair market value may be established by the reasonable cost of repairing the damaged vehicle. *Zhan v. Sherman*, 323 Ark. 172, 913 S.W.2d 776 (1996).

Research References

West's Key Number Digest
Damages ⇨217

Legal Encyclopedias
C.J.S., Damages § 431

AMI 2211

MEASURE OF DAMAGES—LOSS OF CONSORTIUM

[If you find for _____ on *[his][her]* claim for loss of consortium (against any party *[he][she]* is suing) [If an interrogatory requires you to assess the damages of _____ for loss of consortium], you should award *[him][her]* such damages as from the evidence would fairly compensate *[him][her]* for the reasonable value of any loss of the services, society, companionship, and marriage relationship of *[his][her]* *[wife][husband]* proximately caused by the *[negligence]* *[or]* *[fault]* of _____ *[or]* _____].

COMMENT

Either spouse can recover for loss of consortium. *Missouri Pac. Transp. Co. v. Miller*, 227 Ark. 351, 299 S.W.2d 41 (1957) (recovery by wife); *Little Rock Gas & Fuel Co. v. Coppedge*, 116 Ark. 334, 172 S.W. 885 (1915) (recovery by husband).

Loss of consortium is a derivative action. *Sisemore v. Neal*, 236 Ark. 574, 367 S.W.2d 417 (1963).

A child does not have a right of action to recover for the loss of a parent's consortium. *Lewis v. Rowland*, 287 Ark. 474, 701 S.W.2d 122 (1985).

Research References

West's Key Number Digest
Damages ⇨216(8)

Legal Encyclopedias
C.J.S., Damages §§ 426 to 427, 434 to 443

AMI 2212

MEASURE OF DAMAGES—PARENT'S CAUSE OF ACTION—INJURY TO CHILD

[If you decide for _____ (parent) (against any party [he][she] is suing) on [his][her] claim for damages resulting from injuries to _____,] [If an interrogatory requires you to assess the damages of _____ (parent) resulting from injuries to _____,] you must then fix the amount of money which will fairly and reasonably compensate [him] [her] for any of the following elements of damage which you find were proximately caused by the [negligence] [or] [fault] of _____ [or _____]:

- (a) [The reasonable expense of any necessary medical care, treatment and services received by _____ (child) (including [transportation] [and] [board] [and] [lodging] expenses necessarily incurred in securing such care, treatment, or services) (and the present value of such expense reasonably certain to be required in the future during _____'s minority):] (child)
- (b) [The present value of any reasonable expense of medical care and treatment reasonably certain to be incurred in the future during _____'s minority:] (child)
- (c) [The reasonable value of any (services) (and) (contributions) of _____ (child) which the parents have lost (and the present value of any [services] [and] [contributions] the parents are reason-

ably certain to lose in the future [during _____'s
(child)
minority]]).

Whether any of these elements of damage has been proved by the evidence is for you to determine.

NOTE ON USE

Select appropriate paragraphs (a) (b) and (c) as justified by the evidence.

In actions involving children old enough to render services and who have demonstrated an intention or disposition to make contributions to the parents after reaching majority, the bracketed phrase "during _____'s minority" in paragraph (c) should be omitted. See Comment to AMI 2217.

See AMI 2220 for definition of "present value." Use AMI 2213 when a minor is the plaintiff.

In cases where the parent and the minor child are both plaintiffs, AMI 2213 may be used in addition to this instruction.

COMMENT

A parent may recover for medical expenses incurred on behalf of the child. *Arkansas Power & Light Co. v. Connelly*, 185 Ark. 693, 49 S.W.2d 387 (1932); *Byrd v. Galbraith*, 172 Ark. 219, 288 S.W. 717 (1926).

Parents may also recover for loss of services of the child. *Jolly v. Smith*, 188 Ark. 446, 65 S.W.2d 908 (1933). Loss of future services should be reduced to present value. *St. Louis, I.M. & S. Ry. Co. v. Jacks*, 105 Ark. 347, 151 S.W. 706 (1912).

Loss of services is recoverable even when a child has demonstrated no capacity or intention to render services of value to the parent. *Earl v. Mosler Safe Co.*, 291 Ark. 276, 724 S.W.2d 174 (1987) (two-year-old child).

Transportation, board, and lodging expenses necessarily incurred in obtaining required medical care, treatment, and services are recoverable. *Blissett v. Frisby*, 249 Ark. 235, 458 S.W.2d 735 (1970).

The measure of damages is the value of the services and earnings of the child without any deduction for the expenses of support since the parent's duty to support the child continues after the injury as before. *McCORMICK, DAMAGES*, 328 (1935).

Research References

West's Key Number Digest
Damages §216

Legal Encyclopedias
C.J.S., Damages §§ 426 to 427, 434 to 443

MEASURE OF DAMAGES—MINOR PLAINTIFF'S CAUSE OF ACTION

[If you decide for _____ on the question of liability
(minor)
(against any party [*he*][*she*] is suing)] [If an interroga-
tory requires you to assess the damages of _____],
(minor)
you must then fix the amount of money which will
reasonably and fairly compensate [*him*][*her*] for any
of the following elements of damage which you find
were proximately caused by the [*negligence*] [*or*]
[*fault*] of _____ [*or* _____]:

- (a) [*The nature, extent, and duration of any in-
jury;*] [*The nature, extent, duration, and per-
manency of any injury;*] [*The nature, extent,
and duration of any injury and whether it is
temporary or permanent;*]
- (b) [In this regard you should consider the full
extent of any injury sustained, even though
the degree of injury is found by you to have
resulted from the aggravation of a (*condi-
tion*) (*disease*) that already existed and that
predisposed _____ to injury to a greater extent
(minor)
than another person.] [However, you may not
award [*him*][*her*] damages for any (*pain*)
(*mental anguish*) (*disability*) _____
(other appropriate element)
_____ which [*he*][*she*] would have suffered
(of damage)
even though the accident had not occurred;]
- (c) [The reasonable expense of any necessary
medical care, treatment, and services re-
ceived (including [*transportation*] [*and*]
[*board*] [*and*] [*lodging*] expenses necessarily

incurred in securing such care, treatment, or services) (and the present value of such expense reasonably certain to be required in the future);] [The present value of the reasonable expense of any necessary medical care, treatment, and services reasonably certain to be required after reaching majority (including the present value of *[transportation] [and] [board] [and] [lodging]* expenses reasonably certain to be incurred in securing such care, treatment, or services);]

- (d) [Any pain and suffering (*and mental anguish*) experienced in the past (*and reasonably certain to be experienced in the future*);]
- (e) [The value of any (*working time*) (*earnings*) (*profits*) (*salary*) lost (and the present value of any *[working time] [earnings] [profits] [salary]* reasonably certain to be lost in the future);] [The present value of any (*working time*) (*earnings*) (*profits*) (*salary*) reasonably certain to be lost after reaching majority;]
- (f) [The present value of any loss of ability to earn in the future;]
- (g) [Any (*scars*) (*and*) (*disfigurement*) (*and*) (*visible results of [his][her] injury*);]
- (h) [The reasonable expense of any necessary help in *[his][her]* home which has been required as a result of *[his][her]* injury (and the present value of such expense reasonably certain to be required in the future);] [The present value of the reasonable expense of any necessary help in *[his][her]* home reasonably certain to be required as a result of *[his] [her]* injury after reaching majority;]

- (i) *[(His) (Her) inability to attend school;]*
(j) *[If property damage is involved insert here appropriate clause from AMI 2227 through 2229.]*

Whether any of these elements of damage has been proved by the evidence is for you to determine.

NOTE ON USE

The various elements of damage should be included in this instruction when the evidence justifies their use.

See AMI 2220 for definition of "present value."

Use the second bracketed phrase in (c), (e), and (h) (regarding damages after the minor reaches majority) when a parent has made a separate claim for these elements of damages.

AMI 2212 may be used in addition to this instruction when a parent and minor child both assert claims for injuries to the minor.

COMMENT

With regard to all but paragraph (i), damages recoverable by an emancipated minor or one with no living parent are the same as those of an adult. For cases and comments on the other elements see AMI 2202 through 2210. Paragraph (i) is peculiarly applicable to a minor plaintiff. *Briley v. White*, 209 Ark. 941, 193 S.W.2d 326 (1946).

During a child's minority, a parent is entitled to recover the child's earnings (*Jolly v. Smith*, 188 Ark. 446, 65 S.W.2d 908 (1933)) and medical expenses. *Byrd v. Galbraith*, 172 Ark. 219, 288 S.W. 717 (1926). Ordinarily no award may be made for these elements in the action brought on behalf of the child himself. *McCORMICK, DAMAGES*, 329 (1935), particularly cases cited in footnote 11. The child may recover for these elements, however, when he is emancipated or has no living parent.

"His earnings during this time of his minority belong to his parents. In return they are bound to care for, feed, clothe, and defray his expenses during his infancy. Consequently, he was not entitled to recover anything on account of such earnings and expenses. All that he was entitled to recover was his probable loss of earnings after he reached the age of twenty-one years, which he would have acquired had he not been injured, and the increased expenses he will probably incur on account of his injury after that time, and damages for past, present, and

future pain from his injury, and for personal disfigurement . . ." St. Louis, I.M. & S. Ry. Co. v. Warren, 65 Ark. 619, 627, 48 S.W. 222, 225 (1898).

Transportation, board, and lodging expenses necessarily incurred in obtaining required medical care, treatment, and services are recoverable. *Blissett v. Frisby*, 249 Ark. 235, 458 S.W.2d 735 (1970). However, an unemancipated minor cannot recover medical expenses incurred and to be incurred during his minority. *Parrott v. Mallett*, 262 Ark. 525, 558 S.W.2d 152 (1977).

It is error to include, under AMI 2213(g), a nondisfiguring scar which is ordinarily not visible and which does not diminish the future earning power of a minor, even though permanent. *Welter v. Curry*, 260 Ark. 287, 539 S.W.2d 264 (1976).

Research References

West's Key Number Digest
Damages ¶216

Legal Encyclopedias
C.J.S., Damages §§ 426 to 427, 434 to 443

AMI 2214

MITIGATION OF DAMAGES—PERSONAL INJURIES

If it becomes necessary for you to assess damages, then in fixing the amount of money which will reasonably and fairly compensate _____, you are to consider that an injured person must use ordinary care *[to determine whether medical treatment is needed] [and] [to obtain medical treatment] [and] [to follow the instructions of (his) (her) physician]*, and that any damages resulting from a failure to use such care cannot be recovered.

NOTE ON USE

This instruction should be given only when there is evidence that an injured person failed to mitigate his damages.

It should immediately follow the last paragraph of the instruction setting forth the elements of damages which may be recoverable by the person to whom this instruction would apply.

COMMENT

The reasonableness of the plaintiff's conduct in selecting the best remedies or following the instructions of a physician is a jury issue. *Texas & St. Louis Ry. v. Orr*, 46 Ark. 182, 206-07 (1885). *See also* *Burnett v. Seventh St. Produce Co.*, 185 Ark. 367, 369-70, 47 S.W.2d 38, 39 (1932). Once the plaintiff has used ordinary care in the selection of a physician, his damages cannot be "diminished by showing that more skillful [medical] treatment would have produced better results." *E.L. Bruce Co. v. Corbett*, 188 Ark. 962, 967, 69 S.W.2d 270, 273 (1934).

Where a physician's suggested treatment was merely an option, it was not error to refuse to give this instruction. *Coca-Cola Bottling Co. of Memphis, Tenn. v. Priddy*, 328 Ark. 666, 671, 945 S.W.2d 355, 358 (1997).

Research References

West's Key Number Digest
Damages ⇨214

Legal Encyclopedias
C.J.S., Damages §§ 429 to 430

AMI 2215

MEASURE OF DAMAGES—COLLATERAL SOURCES

In assessing the damages of _____ [plaintiff], do not reduce the amount of damages based on any information or belief you have that _____ [plaintiff] has received, or may receive, benefits from other sources in connection with [his/her] injuries [other than those which have been paid by or on behalf of _____ (defendant)]. This includes worker's compensation, Social Security, health insurance or any other benefits. Do not speculate on this.

Your duty is to determine damages based only on the evidence presented at trial and my instructions. Any reduction required by law will be made by the Court.

NOTE ON USE

This instruction should be given when evidence of the receipt of benefits or payments is admitted into evidence or the jury poses a question concerning a collateral source.

There are also other circumstances where the jury may acquire knowledge of collateral sources (for example, from impeachment evidence or a nonresponsive answer) or may assume, believe or infer the existence of collateral sources given the facts of the case (for example, an injured person likely to be covered by workers' compensation, first-party medical insurance, or governmental benefits) or the type of damages involved. This instruction should therefore be given if the circumstances of the case warrant its use, and if requested by the claiming party.

Use the bracketed provision when evidence is introduced of payments by or on behalf of a defendant.

COMMENT

The collateral source rule is both a principle of the substantive law of damages, providing that a plaintiff's receipt of benefits or payments

from the collateral source does not reduce the plaintiff's recovery from defendant, and a rule of evidence, generally precluding a defendant from eliciting or introducing evidence of such benefits or payments. *Younts v. Baldor Elec. Co.*, 310 Ark. 86, 88, 90, 832 S.W.2d 832, 834, 835 (1992) (collateral source rule "excludes evidence of benefits received by a plaintiff from a source collateral to the defendant" and the plaintiff has "a substantive right not to have his recovery so reduced if indeed he recovered from insurance for which he paid"). See *Parker v. Wideman*, 380 F.2d 433, 436 (5th Cir. 1967) (collateral source rule is "substantive rule of law which applies whether or not evidence of collateral compensation is introduced," applying Florida law). See generally James L. Branton, *The Collateral Source Rule*, 18 St. Mary's L.J. 883 (1987) (observing that collateral source rule is both substantive rule of law and rule of evidence); RESTATEMENT (SECOND) OF TORTS § 920A (payments or benefits from collateral source do not reduce plaintiff's recovery).

In accord with several other jurisdictions, this instruction is intended to clarify what the jury is to consider in assessing damages and specifically to reduce speculation about the existence of such benefits or payments and their effect on its award. Fla. Standard Jury Instructions—Civil Cases § 6.13, Note on Use, 700 So. 2d 377 (Fla. 1997) (per curiam) (collateral source instruction to be given in proper case if "improper evidence of collateral benefits is inadvertently admitted or if, in the circumstances of the case, the payment of collateral benefits is inferred"); Ill. Pattern Jury Instructions—Civil § 3.03, Note on Use (2011 ed.) ("With the wide prevalence of liability insurance . . . many jurors question the role of insurance in contested accident, medical malpractice or other cases."); Md. Civil Pattern Jury Instructions § 10:8 (4th ed. 2009) (jurors instructed not to "reduce the amount of your award because you believe or infer that the plaintiff has received or will receive reimbursement," payments, or benefits from a collateral source); Mo. Approved Jury Instructions (Civil) § 34.05, cmt. (7th ed., 2012 revision) (jury's "knowledge" of payment "may be acquired from impeaching evidence, a nonresponsive answer, collateral source supposition, or inference from the disappearance of a settling party defendant"; instruction intended to avoid juror speculation); Nev. Jury Instructions Civil § 1-12-101 No. 1.07 (Michie 1986) (providing alternative instruction to be "used in cases in which the plaintiff's damages are the type which may have been compensated" by a collateral source).

Jurors' statements during deliberations that plaintiff's medical expenses would be paid by his federal employee's health insurance plan, which were based on their own personal experience as federal employees, do not constitute "extraneous prejudicial information" under Arkansas Rule of Evidence 606(b). *Blake v. Shellstrom*, 2012 Ark. 428, at 9–10. The plaintiff in *Blake* did not request that AMI 2215 be given.

In Arkansas, a plaintiff seeking recovery for medical expenses may

invoke the collateral source rule to exclude evidence that the plaintiff had actually paid less than the full amount of those expenses (e.g., because the provider had discounted the bill or some portion had been covered by another source). *Montgomery Ward & Co. v. Anderson*, 334 Ark. 561, 564–68, 976 S.W.2d 382, 383–85 (1998) (excluding under collateral source rule evidence of an agreement between the plaintiff and a hospital to discount the hospital bill by 50%) (distinguishing *Auto Transports, Inc. v. May*, 224 Ark. 704, 275 S.W.2d 767 (1955), as based on a failure of proof by plaintiff of medical expenses). The medical-cost provision, § 15(b), of the Civil Justice Reform Act, Act 649 of 2003, codified at Ark. Code Ann. § 16-55-212(b), apparently sought to overrule *Montgomery Ward* by limiting evidence of damages for costs of necessary medical care, treatment, or services to only “those costs actually paid by, or on behalf of, the plaintiff or which remain unpaid and for which the plaintiff or any third party shall be legally responsible.” In *Johnson v. Rockwell Automation, Inc.*, however, the court held the medical-cost provision of the Civil Justice Reform Act unconstitutional as a violation of the separation of powers principle embodied in Article 4, § 2 and Amendment 80, § 3 of the Arkansas Constitution because it purported to prescribe a rule of evidence. 2009 Ark. 241, at 9–10, 308 S.W.3d 135, 142. Presumably, *Johnson* also applies to § 19(b) of the Act, Ark. Code Ann. § 16-114-208(a), the medical malpractice version of the medical-cost provisions.

A claiming party’s testimony that he felt obligated to pay his doctor’s bill, when some of his medical bills were paid by his own insurer, does not make the source of the payments proper impeachment evidence. *Patton v. Williams*, 284 Ark. 187, 187–90, 680 S.W.2d 707, 708–09 (1984). For an exception to the rule of exclusion to apply, the evidence to be impeached must be misleading on some point other than whether there is insurance. *Wal-Mart Stores, Inc. v. Kilgore*, 85 Ark. App. 231, 240–42 148 S.W.3d 754, 759–61 (2004).

Research References

West’s Key Number Digest,

Damages ◊214

Legal Encyclopedias

C.J.S., Damages § 430.

AMI 2216

**MEASURE OF DAMAGES—WRONGFUL DEATH—
CAUSE OF ACTION**

_____ as administrator of the estate
of _____, deceased, represents the
estate of the deceased and also

(names of wife or husband,

children, father, mother, sisters, or persons in loco parentis for whom claims are made)

The administrator is suing for the following ele-
ments of damage on behalf of [_____] [and]
(wife or husband)

[_____] :
(names of statutory beneficiaries)

(a) [Pecuniary injuries sustained by (_____)]
(wife or husband)
(and) (_____)].
(names of statutory beneficiaries entitled to recover for pecuniary injuries)

(b) [Mental anguish suffered (*and reasonably
probable to be suffered in the future*) by (_____)]
(wife or husband)
(and) (_____)].
(names of statutory beneficiaries making claim)

(c) [Loss of consortium of _____].
(wife or husband)

First, let me explain to you what is meant by the
term "pecuniary injuries." This term refers to the pre-
sent value of benefits, including money, goods, and
services, that the deceased would have contributed
to _____ [and] _____ had
(wife or husband) (names of appropriate statutory beneficiaries)
[he][she] lived. In making your determination of
pecuniary injuries, you may consider the following
factors concerning the deceased:

(a) [What the deceased customarily contributed

vices, companionship, and marriage relationship of the [husband] [wife].

The administrator is also suing for the following elements of damage on behalf of the estate:

- (a) [The decedent's loss of life];
- (b) [The reasonable value of funeral expenses];
- (c) [Property damage];
- (d) [Conscious pain and suffering of the deceased prior to (his) (her) death];
- (e) [Medical expenses attributable to the fatal injury];
- (f) [The value of any (earnings) (profits) (salary) (working time) lost by the deceased person prior to (his) (her) death];
- (g) [Any (scars) (disfigurement) (and) (visible results of the injury) sustained by the deceased prior to (his) (her) death];
- (h) [The reasonable expenses of any necessary help in (his) (her) home that prior to (his) (her) death was required as a result of the deceased's injuries].

[If you decide for the administrator on the question of liability (against any party (he) (she) is suing)] [If an interrogatory requires you to assess the damages of the administrator], you must fix the amount of money that will reasonably and fairly compensate

[
 (wife or
) [and] [
 husband) (names of other statutory beneficiaries making claims)
 [the estate] for those elements of damage sustained

[which you find were proximately caused by the [negligence] [or] [fault] of _____].
(defendant)

Whether any of the damages sued for on behalf of [_____] [and] [_____] have been proved by the evidence is for you to determine.
(wife or husband) (names of statutory beneficiaries making claim)

NOTE ON USE

If the deceased was an unmarried minor, use AMI 2217.

The elements justified by the evidence should first be selected; then only the explanations that relate to the elements selected should be used.

When the case is submitted on interrogatories which cover the question of proximate cause, then the final bracketed clause in the next to last paragraph referring to proximate cause should be omitted.

See AMI 2220 for the meaning of "present value."

COMMENT

The definition of mental anguish in this instruction was revised in accordance with the 1993 amendment to Ark. Code Ann. § 16-62-102 to include the grief normally associated with the loss of a loved one, and to eliminate the factors formerly enumerated as the basis for distinguishing mental anguish from normal grief. *See, e.g., St. Louis Southwestern Ry. Co. v. Pennington*, 261 Ark. 650, 553 S.W.2d 436 (1977).

The action for wrongful death is entirely statutory and did not exist at common law. The Arkansas Wrongful Death Statute is more comprehensive than that of most other states.

The pecuniary injury is determined by the contributions the deceased would have made during the lifetime of the deceased or the beneficiary, whichever is shorter. *Southern Nat. Ins. Co. v. Williams*, 224 Ark. 938, 277 S.W.2d 487 (1955); *Missouri Pac. R. Co. v. Gilbert*, 206 Ark. 683, 178 S.W.2d 73 (1944).

Contributions to a minor child ordinarily are computed only during his minority. *Missouri Pac. R. Co. v. Gilbert*, *supra*. Under special circumstances, however, a child can recover for pecuniary contributions beyond minority. *Strahan v. Webb*, 231 Ark. 426, 330 S.W.2d 291 (1959).

Contributions must be reduced to present value. *Acco Transp. Co. v. Smith*, 207 Ark. 70, 178 S.W.2d 1011 (1944).

Loss of parental care and guidance for a minor child may be computed as a part of the pecuniary injury. *Missouri Pac. R. Co. v. Creekmore*, 193 Ark. 722, 102 S.W.2d 553 (1937); *St. Louis, I.M. & S. Ry. Co. v. Standifer*, 81 Ark. 275, 99 S.W. 81 (1907). A parent may recover pecuniary loss for the death of an adult child, if there is reasonable expectation of pecuniary benefit from the continued life of the child. *Fordyce v. McCants*, 51 Ark. 509, 11 S.W. 694 (1889).

Fountain v. Chicago, R.I. & P. Ry., 243 Ark. 947, 422 S.W.2d 878 (1968), overrules *Peugh v. Oliger*, 233 Ark. 281, 345 S.W.2d 610 (1961); and holds that damages for mental anguish may be awarded to the surviving spouse, children, father, mother, brother, sister, or person standing *in loco parentis*, without regard to whether they are heirs or next of kin.

A stepchild to whom the deceased stood *in loco parentis* and the deceased's adopted child may recover for pecuniary losses and mental anguish. *Moon Distributors, Inc. v. White*, 245 Ark. 627, 434 S.W.2d 56 (1968).

Either spouse can recover for loss of consortium. Ark. Code Ann. § 16-62-102.

Future mental anguish is recoverable. *Knoles v. Salazar*, 298 Ark. 281, 766 S.W.2d 613 (1989).

For cases involving conscious pain and suffering prior to death, *see New Prospect Drilling Co. v. First Commercial Trust, N.A.*, 332 Ark. 466, 966 S.W.2d 233 (1998); *Chambliss v. Brinton*, 229 Ark. 526, 317 S.W.2d 143 (1958); *Southern Nat. Ins. Co. v. Williams*, *supra*; *Sinclair Refining Co. v. Henderson*, 197 Ark. 319, 122 S.W.2d 580 (1938).

For the right of an estate to recover funeral expenses, *see King v. Cardin*, 229 Ark. 929, 319 S.W.2d 214 (1959). A husband may recover expenses of his wife's funeral on the theory that it is his duty to pay them. There being no corresponding duty on the part of a widow to pay the expenses of her husband's funeral, these can only be recovered by the estate of the deceased husband through a personal representative. *McCormick v. Sexton*, 239 Ark. 29, 386 S.W.2d 930 (1965).

See Henry Woods, Arkansas Model Jury Instructions: Wrongful Death, 20 Ark. L. Rev. 73 (1966).

Arkansas Supreme Court decisions permit the recovery of punitive damages in a wrongful death case. *Vickery v. Ballentine*, 293 Ark. 54, 732 S.W.2d 160 (1987); *Fields v. Huff*, 510 F. Supp. 238 (E.D. Ark. 1981). *See also* Comment, *The Arkansas Wrongful Death Statute*, 35 Ark. L. Rev. 294, 306 (1981).

As a result of a 2001 amendment to Ark. Code Ann. § 16-62-101, damages for the decedent’s “loss of life” are now recoverable by the estate as an independent element of damage. These are the damages that would compensate a decedent for the loss of the value that a decedent would have placed on his or her own life. *Durham v. Marberry*, 356 Ark. 481, 156 S.W.3d 242 (2004).

Research References

West’s Key Number Digest
Death ⌘104(6)

Legal Encyclopedias
C.J.S., Death §§ 248 to 253

AMI 2217

MEASURE OF DAMAGES—WRONGFUL DEATH— UNMARRIED MINOR

_____ as administrator of the estate of _____, the deceased minor, represents the estate of the deceased and also _____

(father, mother, brothers,

sisters, or persons in loco parentis for whom claims are made)

[If you decide for the administrator on the question of liability (against any party *[he][she]* is suing)] [If an interrogatory requires you to assess the damages of the administrator], you should determine *[from the evidence]* the present value of any *[services]* *[and]* *[contributions]* that would have been received by the parent(s) *[during the child's minority]*, less providing for the child. You should then fix an amount that would fairly and reasonably compensate the parents for the net value of such *[services]* *[and]* *[contributions]*.

[In the case of the death of a child too young to be capable of earning anything or rendering services of any value, the value of its probable future services to the parent during its minority is necessarily a matter of conjecture, and may be determined by you without the testimony of witnesses.]

[You should also determine an amount from the evidence that would reasonably compensate _____

(names of

_____ for any mental statutory beneficiaries making claims for mental anguish)

anguish *(he) (she) (they) (has) (have)* endured as a result of the death of the minor *(and reasonably probable to be endured in the future)*. Mental anguish includes the mental suffering resulting from emotions,

such as grief and despair, associated with the loss of a loved one.]

[One] [Certain] element(s) of damage may be awarded only to the estate of _____. *[This is]*
(deceased minor)

[These are] [decedent's loss of life] [the reasonable value of funeral expenses] [and] [conscious pain and suffering (and mental anguish) of the deceased prior to death] [and] [the reasonable value of medical expenses attributable to the fatal injury] [and] [property damage] [and] [the value of any (earnings) (profits) (salary) (working time) lost by the deceased prior to death] [and] [any (scars) (disfigurement) (and) (visible results of the injury) sustained by the deceased prior to death.]

Whether any of the damages sued for have been proved by the evidence is for you to determine.

NOTE ON USE

This instruction should be used when the wrongful death action under Ark. Code Ann. § 16-62-102 is brought for the death of an unmarried minor child.

In actions involving children who are old enough to render services and have demonstrated an intention or disposition to make contributions to the parents after reaching majority, the bracketed phrase "during the child's minority" in the second paragraph, and the entire third paragraph, should be omitted.

In an action involving children too young to render services or make contributions, the bracketed phrase "from the evidence" in the second paragraph should be omitted.

See AMI 2220 for the meaning of "present value."

If the action is brought for the death of an unborn viable fetus, this instruction should be appropriately modified.

COMMENT

This instruction is revised in accordance with the substantive law

created by the 1993 amendment to Ark. Codé Ann. § 16-62-102. This amendment included, within the definition of mental anguish, the grief normally associated with the loss of a loved one. The factors formerly enumerated, following the definition of mental anguish, have been eliminated as being inconsistent with the change in the definition of mental anguish affected by the 1993 amendment. These factors were the bases for distinguishing mental anguish from normal grief. E.g., *St. Louis Southwestern Ry. Co. v. Pennington*, 261 Ark. 650, 553 S.W.2d 436 (1977).

When the child is too young to earn anything, a recovery by the parents for pecuniary contributions beyond the child's minority cannot be considered. *Interurban Ry. Co. v. Trainer*, 150 Ark. 19, 233 S.W. 816 (1921). *See also* *Morel v. Lee*, 182 Ark. 985, 33 S.W.2d 1110 (1930). Some Arkansas cases are discussed in *McCORMICK, DAMAGES*, 354 (1935); Annot., 14 A.L.R.2d 485 (1950).

When the deceased minor made contributions to his parents and demonstrated a disposition or intention to make contributions to them after reaching his majority, the parents are entitled to recover those anticipated contributions. *Missouri Pac. Transp. Co. v. Parker*, 200 Ark. 620, 140 S.W.2d 997 (1940), *cert. denied*, 311 U.S. 696, 61 S. Ct. 133, 85 L.Ed. 450 (1940). "We do not understand the rule to be . . . that the parent is limited absolutely to a recovery for damages, in case of the wrongful killing of his child, to its earning capacity during the remainder of its minority; but, on the contrary, is entitled to recover such sum as the parent would have received had the child continued to live, considering all the facts and circumstances in the particular case." *Missouri Pac. R. Co. v. McKinney*, 189 Ark. 69, 73, 71 S.W.2d 180, 182 (1934). *See also* *Southwestern Gas & Electric Co. v. Godfrey*, 178 Ark. 103, 10 S.W.2d 894 (1928); and *St. Louis, I.M. & S. Ry. Co. v. Jacks*, 105 Ark. 347, 151 S.W. 706 (1912).

Arkansas seems to follow the general rule that the probable cost of supporting the child should be deducted from the value of his services. *Missouri Pac. Transp. Co. v. Parker*, *supra*; *Morel v. Lee*, *supra*; and *Interurban Ry. Co. v. Trainer*, *supra*. Some opinions, however, mention loss of services without reference to a deduction of expenses of the child. *See, e.g., St. Louis-San Francisco Ry. Co. v. McCarn*, 212 Ark. 287, 205 S.W.2d 704 (1947); *St. Louis S.F. Ry. Co. v. Perryman*, 213 Ark. 550, 211 S.W.2d 647 (1948); and *Hines v. Johnson*, 145 Ark. 592, 224 S.W. 989 (1920). *See* *McCORMICK, DAMAGES*, 353 (1935), fn. 89.

No evidence is necessary to establish the value of the services of a child so young as to be incapable of earning. *Hines*, *supra*. In *Missouri Pac. R. Co. v. Maxwell*, 194 Ark. 938, 944, 109 S.W.2d 1254, 1258 (1937), the following instruction was approved: "You are instructed that where damages are claimed for the death of a child incapable of earning anything or rendering services of any value, the value of its probable future service to the parent during its minority is a matter of conjecture

and may be determined by the jury without the testimony of witnesses." The worth of the child's services to the parents should be reduced to its present value. *St. Louis, I.M. & S. Ry. Co. v. Jacks, supra*.

A parent's fault may reduce or bar recovery for the wrongful death of the child. *See Stull v. Ragsdale*, 273 Ark. 277, 620 S.W.2d 264 (1981).

Fountain v. Chicago, R.I. & P. Ry., 243 Ark. 947, 422 S.W.2d 878 (1968), overrules *Peugh v. Oliger*, 233 Ark. 281, 345 S.W.2d 610 (1961); and holds that damages for mental anguish may be awarded to the surviving spouse, children, father, mother, brother, sister, or person standing *in loco parentis*, without regard to whether they are heirs or next of kin.

Future mental anguish is recoverable. *Knoles v. Salazar*, 298 Ark. 281, 766 S.W.2d 613 (1989).

Arkansas Supreme Court decisions permit the recovery of punitive damages in a wrongful death case. *Vickery v. Ballentine*, 293 Ark. 54, 732 S.W.2d 160 (1987); *Fields v. Huff*, 510 F. Supp. 238 (E.D. Ark. 1981). *See also* Comment, The Arkansas Wrongful Death Statute, 35 Ark.L.Rev. 294, 306 (1981).

For a discussion of damages recoverable in the case of an unemancipated minor, *see Potts v. Benjamin*, 882 F.2d 1320 (8th Cir. 1989).

As a result of a 2001 amendment to Ark. Code Ann. § 16-62-101, damages for the decedent's "loss of life" are now recoverable by the estate as an independent element of damage. These are the damages that would compensate a decedent for the loss of the value that a decedent would have placed on his or her own life. *Durham v. Marberry*, 356 Ark. 481, 156 S.W.3d 242 (2004).

An unborn viable fetus is a "person" for purposes of the Arkansas wrongful death statute. *Aka v. Jefferson Hospital Ass'n, Inc.*, 344 Ark. 627, 42 S.W.3d 508 (2001), overruling *Chatelain v. Kelley*, 322 Ark. 517, 910 S.W.2d 215 (1995); *see also* Act 1265 of 2001 (amending Ark. Code Ann. § 16-62-102(a)); *McCoy v. Crumby*, 353 Ark. 251, 106 S.W.3d 462 (2003).

Research References

West's Key Number Digest
Death ⇨104(5)

AMI 2218

PUNITIVE DAMAGES

In addition to compensatory damages for any actual loss that _____ may have sustained, *[he][she]*
 (plaintiff)
 asks for punitive damages from _____. Punitive dam-
 (defendant)
 ages may be imposed to punish a wrongdoer and to deter the wrongdoer and others from similar conduct. In order to recover punitive damages from _____,
 (defendant)
 _____ has the burden of proving by clear and convinc-
 (plaintiff)
 ing evidence *[either, first]:*

[That _____ knew or ought to have known, in the
 (defendant)
 light of the surrounding circumstances, that *[his][her][its]* conduct would naturally and proba-
 bly result in *(injury) (damage)* and that *[he][she][it]*
 continued such conduct *(with malice or)* in reck-
 less disregard of the consequences from which
 malice may be inferred]

[Or, second]

[That _____ intentionally pursued a course of
 (defendant)
 conduct for the purpose of causing *(injury) (dam-
 age)*]

[Or both].

[In arriving at the amount of punitive damages you may consider the financial condition of _____,
 (defendant)
 as shown by the evidence.]

“Clear and convincing evidence” is proof that enables you without hesitation to reach a firm conviction that the allegation is true.

You are not required to assess punitive damages against _____ but you may do so if justified by the evidence.
(defendant)

[You may consider an award of punitive damages only if you found that _____ is entitled to recover compensatory damages.]
(plaintiff)

NOTE ON USE

This instruction may be used when the plaintiff seeks punitive damages against one or more defendants either for unintentional conduct or for intentional conduct or for both.

Use the bracketed references to clear and convincing evidence for all claims accruing on or after March 25, 2003.

Use the parenthesized reference to malice only when there is evidence to support a finding of express malice.

Use the bracketed reference to defendant's financial condition only if there is evidence of a defendant's financial condition.

The last bracketed sentence is to be for claims accruing on or after March 25, 2003, unless punitive damages proceedings are bifurcated from the compensatory damages proceedings.

When the underlying tort requires proof of malice, give the instruction regarding that malice element along with this instruction.

If the case involves evidence of out-of-state conduct that was lawful in the jurisdiction where it occurred, use AMI 2218A.

If evidence had been admitted or argument introduced that defendant's conduct has caused harm to non-parties, see AMI 2218A and its Note on Use.

COMMENT

Ark. Acts 2003, No. 649 (Ark. Code Ann. §§ 16-55-201 et seq. and §§ 16-114-206, 16-114-208 to 16-114-212, “The Civil Justice Reform Act

of 2003”) govern the awarding of punitive damages and the amounts that may be awarded for claims accruing on or after March 25, 2003. Under Ark. Code Ann. §§ 16-55-206 and 207, to recover punitive damages a plaintiff must prove, by clear and convincing evidence, either or both of two aggravating factors: “(1) That the defendant knew or ought to have known, in light of the surrounding circumstances, that his or her conduct would naturally and probably result in injury or damage and he or she continued the conduct with malice or in reckless disregard of the consequences from which malice might be inferred; or (2) That the defendant intentionally pursued a course of conduct for the purpose of causing injury or damage.” Arkansas Code Ann. § 16-55-210 provides that nothing in the Act shall limit trial or appellate courts’ duties to: scrutinize all punitive damage awards; ensure that such awards comply with applicable procedural, evidentiary, and constitutional requirements; and order remittitur where appropriate. It precludes admission in the compensatory-damages proceeding of evidence of defendant’s financial condition and other evidence relevant only to punitive damages. Arkansas Code Ann. § 16-55-208, which had capped the amount of punitive damages in cases of unintentional wrongdoing, was held unconstitutional in *Bayer Cropscience LP v. Schafer*, 2011 Ark. 518 at 9–14. The court ruled that it violates art. 5, § 32 of the Arkansas Constitution, as amended by Amendment 26.

On February 26, 2015 in response to the recommendations of its *Special Task Force on Practice and Procedure in Civil Cases*, the Arkansas Supreme Court amended Ark. R. Civ. P. 42 (b) and superseded Ark. Code Ann. § 16-55-211, which required bifurcation of the entire punitive-damages claim on motion of a party.

Under the revised rule, the trial judge has the discretion in the first phase whether to allow the jury to decide if punitive damages are warranted (not the amount) or to defer the determination to the second phase. Upon the motion of any party and if warranted by the evidence, the amount of punitive damages, if any, must be decided in the second proceeding.

The court characterized AMI 2217, the predecessor to AMI 2218, as an “embodiment of the law on punitive damages” in *Stein v. Lukas*, 308 Ark. 74, 78, 823 S.W.2d 832, 834 (1992) (citing *Dongary Holstein Leasing Inc., v. Covington*, 293 Ark. 112, 732 S.W. 2d 465 (1987)).

The “first” element in this instruction has been held to apply only to negligence cases. The “second” element constitutes the modification of this instruction necessary to its use in an intentional tort case. *See generally* *Ford Motor Credit Co. v. Herring*, 267 Ark. 201, 589 S.W.2d 584 (1979) (conversion claim); *Tandy Corp. v. Bone*, 283 Ark. 399, 678 S.W.2d 312 (1984) (outrage claim). The Arkansas Supreme Court has ruled that it is not error to give both elements of the instruction in the alternative. *Croom v. Younts*, 323 Ark. 95, 104–05 913 S.W.2d 283, 288 (1996) (outrage claim).

It is error to give this instruction without including the scienter standard from the underlying tort when that standard requires proof of scienter greater than that stated in this instruction. *Wal-Mart v. Binns*, 341 Ark. 157, 164–65, 15 S.W.3d 320, 325 (2000) (underlying claim was for malicious prosecution; the court defined the scienter standard as requiring proof of “intent and a spirit of ill will, hatred, or revenge”). (Note that the malicious prosecution standard stated in *Wal-Mart v. Binns* appears to be inconsistent with that applied in other Arkansas cases. See AMI 413 and accompanying Comment.) It is not error, however, to give this instruction if the malice standard from the underlying tort is also included. *Carr v. Nance*, 2010 Ark. 497, at 25 (affirming the giving of this instruction in conjunction with an instruction on the underlying malice element derived from the Arkansas recreational use statute, Ark. Code Ann. § 18-11-307(1)).

Punitive damages have been held to be recoverable in several cases involving claims based on statutory causes of action, despite the absence of a statutory provision specifically enumerating punitive damages as a recoverable element. *HCA Health Services of Midwest, Inc. v. Nat'l Bank of Commerce of El Dorado*, 294 Ark. 525, 528–29, 745 S.W.2d 120, 122–23 (1988) (medical malpractice); *Vickery v. Ballentine*, 293 Ark. 54, 55–56, 732 S.W.2d 160, 161 (1987) (wrongful death) (citing Comment, The Arkansas Wrongful Death Statute, 35 Ark. L. Rev. 294, 306 (1981)); *Fields v. Huff*, 510 F. Supp. 238, 241–42 (E.D. Ark. 1981) (same); *Forrest City Mach. Works, Inc. v. Aderhold*, 273 Ark. 33, 43–44 616 S.W.2d 720, 726 (1981) (products liability). See also *Airco, Inc. v. Simmons First Nat'l Bank*, 276 Ark. 486, 492, 638 S.W.2d 660, 663 (1982) (upholding punitive damages award in products liability case). The court upheld an award of punitive damages under an exception to the statutory immunity to negligence liability set forth in the Arkansas recreational use statute, Ark. Code Ann. § 18-11-307(1). *Carr v. Nance*, 2010 Ark. 497, at 25.

Punitive damages have been held to be recoverable in a variety of other situations. See generally, e.g., *Dixon Ticonderoga Co. v. Winburn Tile Mfg. Co.*, 324 Ark. 266, 920 S.W.2d 829 (1996) (deceit); *Viking Ins. Co. of Wis. v. Jester*, 310 Ark. 317, 836 S.W.2d 371 (1992) (bad faith refusal to settle insurance claim); *Interstate Freeway Serv., Inc. v. Houser*, 310 Ark. 302, 835 S.W.2d 872 (1992) (fraud in employment contract); *Honeycutt v. Walden*, 294 Ark. 440, 743 S.W.2d 809 (1988) (driving while intoxicated); *Bruns v. Bruns*, 290 Ark. 347, 719 S.W.2d 691 (1986) (spousal assault); *Brown v. Chapman Farms, Inc.*, 289 Ark. 88, 709 S.W.2d 404 (1986) (trespass and intentional destruction of crops); *Lou v. Smith*, 285 Ark. 249, 685 S.W.2d 809 (1985) (pharmacist's intentional changing of physician's prescription for patient); *DWB, LLC v. D&T Pure Trust*, 2018 Ark. App. 283, 550 S.W.3d 420 (conversion).

Punitive damages are recoverable at common law against an employer under a theory of respondeat superior even absent proof that the employer knew of the employee's conduct, authorized it, or ratified it. *Miller v. Blanton*, 213 Ark. 246, 250–54, 210 S.W.2d 293, 296–97

(1948). *See also* Life & Cas. Ins. Co. of Tenn. v. Padgett, 241 Ark. 353, 355-56, 407 S.W.3d 728, 729-730 (1966) (holding employer liable for intentional torts committed within scope of employment).

Punitive damages are not recoverable against the at-fault driver of an automobile for failing to stop at the scene of the accident. Freeman v. Anderson, 279 Ark. 282, 286-87, 651 S.W.2d 450, 452 (1983) (quoting AMI 2217). Punitive damages are not recoverable for violation of a Federal Motor Vehicle Safety regulation requiring post-accident alcohol and drug testing of the driver when there was no indication that the violation contributed to the accident. Brumley v. Keech, 2012 Ark. 263, at 5-6 (rejecting punitive damages claim based on violation of 49 C.F.R. § 382.303).

In conversion actions, punitive damages are not recoverable "simply because the defendant intentionally exercised dominion or control over the plaintiff's property." City Nat'l Bank of Fort Smith v. Goodwin, 301 Ark. 182, 188, 783 S.W.2d 335, 338 (1990). "Instead, the plaintiff must show that the defendant intentionally exercised dominion or control over the plaintiff's property for the purpose of violating his right to the property or for the purpose of causing damage." *Id.*, 783 S.W.2d at 338. *See also* Huffman v. Landers Ford North, Inc., 100 Ark. App. 159, 164, 265 S.W.3d 783, 786-87 (2007) (discussing *City National Bank*). The Eighth Circuit has read Arkansas law as generalizing this point to all intentional tort claims. Robertson Oil Co. v. Phillips Petroleum Co., 14 F.3d 373, 389-90 (8th Cir. 1993) (en banc) ("evidence of or the bare finding of an intentional tort is not sufficient to trigger deliberations on punitive damages"; instead, the punitive damages plaintiff must show a purpose to cause injury), *overruled on other grounds by* Cottier v. City of Martin, 604 F.3d 553, 557 (8th Cir. 2010) (en banc).

The Arkansas Supreme Court has ruled that "[w]here exemplary or punitive damages are recoverable, evidence of the wealth or financial condition of the defendant is admissible, and is a proper element for the jury to consider in finding such damages, for it is obvious that what would be of no consequence to a rich man might be ruinous to a poor man." Porter v. Lincoln, 282 Ark. 258, 261B, 668 S.W.2d 11, 14 (1984) (quoting Hardy v. Raines, 228 Ark. 648, 310 S.W.2d 494 (1958)). To similar effect, the court in *Holmes v. Hollingsworth*, observed that the defendant's financial condition "may be considered by the jury in determining the amount of exemplary damages to be allowed." 234 Ark. 347, 352, 352 S.W.2d 96, 99 (1961) (involving an impecunious defendant), (quoting 15 Am. Jur. § 346). An instruction concerning defendant's financial condition may not be given, however, in the absence of evidence about that issue. Bank of Cabot v. Ray, 279 Ark. 92, 94, 648 S.W.2d 800, 801 (1983). *See also* James v. Bill C. Harris Const. Co., Inc., 297 Ark. 435, 439, 763 S.W.2d 640, 642 (upholding trial court's refusal to admit evidence of defendant's net worth because there was not substantial evidence to satisfy the "malice" element).

When the issue of punitive damages, supported by proof of financial

worth of any defendant, is improperly submitted to a jury, even an award of compensatory damages cannot be sustained. *Berkeley Pump Co. v. Reed—Joseph Land Co.*, 279 Ark. 384, 402, 653 S.W.2d 128, 138 (1983); *Life & Cas. Ins. Co. of Tenn.*, 241 Ark. at 356–57, 407 S.W.2d at 730. Where, however, there was no proof of any defendant's financial condition or other prejudice, erroneous submission of punitive damages issue to the jury is not reversible error. *Robinson v. Abbott*, 292 Ark. 630, 632, 731 S.W.2d 782, 783 (1987).

A defendant who has successfully objected to introduction of defendant's own financial worth at trial may not introduce such information at a post-trial hearing on excessiveness of a punitive damages award. *Advocat, Inc. v. Sauer*, 353 Ark. 29, 51, 111 S.W.3d 346, 358 (2003).

A plaintiff who claims punitive damages from several defendants waives the right to introduce evidence of the financial worth of one defendant. *Dalrymple v. Fields*, 276 Ark. 185, 189, 633 S.W.2d 362, 364 (1982); *Life & Cas. Ins. Co. of Tenn.*, 241 Ark. at 356–57, 407 S.W.2d at 730. When compensatory damages are claimed from multiple defendants and punitive damages from only one, however, evidence of the financial worth of that one can be introduced only if his alleged misconduct is different from and more culpable than that of the other defendants. *Berkeley Pump Co.*, 279 Ark. at 401, 653 S.W.2d at 137.

The court in *Bayer v. CropScience LP*, *supra*, stated that “we have observed that the issues of compensatory damages and punitive damages are so interwoven that an error with respect to one requires a retrial of the whole case.” 2011 Ark. 518, at 13 (citing *Life & Cas. Ins. Co. of Tenn. v. Padgett*, 241 Ark. 353, 407 S.W.2d 728 (1966)). Although the court did not confine its statement to the particular error in *Life & Cas. Ins. Co. of Tennessee v. Padgett* (admission of evidence of financial worth in punitive damages case against more than one defendant), it did not explicitly disapprove the general principle applied in *Robinson* that non-prejudicial error with respect to punitive damages does not require retrial of the entire case, which principle was not presented in *Bayer*.

While joint tortfeasors may be jointly and severally liable for punitive damages, “[w]here two or more defendants are alleged to have committed virtually identical wrongs, it would be unfair to allow the plaintiff to seek compensatory damages from all of them but punitive damages from only one.” *Missouri Pac. R. Co. v. Ark. Sheriff's Boys' Ranch*, 280 Ark. 53, 59–60, 655 S.W.2d 389, 392–393 (1983) (emphasis in original) (explaining *Curtis v. Partain*, 272 Ark. 400, 614 S.W.2d 671 (1981), *overruled by*, *Lupo v. Lineberger*, 313 Ark. 315, 855 S.W.2d 293 (1993)).

Gross negligence is not sufficient to justify punitive damages. *Orsini v. Larry Moyer Trucking, Inc.*, 310 Ark. 179, 182, 833 S.W.2d 366, 367

(1992) (legal malpractice); *Nat'l By—Products, Inc. v. Searcy House Moving Co.*, 292 Ark. 491, 494, 731 S.W.2d 194, 196 (1987) (negligent operation and maintenance of tractor-trailer). *See also* *Potts v. Benjamin*, 882 F.2d 1320, 1327 (8th Cir. 1989) (distinguishing *National By—Products, Inc.*).

For discussion of the distinction between willful and wanton conduct and gross negligence in the context of vehicle accident cases, *see generally* Justice Dudley's concurring opinion in *National Bank of Commerce v. McNeill Trucking Co. Inc.*, 309 Ark. 80, 88, 828 S.W.2d 584, 588 (1992) (arguing for adoption of bifurcation and a "clear and convincing evidence" standard of proof in punitive damages cases).

While the election-of-remedies doctrine precludes recovery of both a restitutionary award based on rescission and a compensatory damages award based on deceit, an action for punitive damages may, upon sufficient proof of the elements of deceit, accompany an award for restitution in an action for rescission. *Thomas Auto Co. v. Craft*, 297 Ark. 492, 493–94, 763 S.W.2d 651, 652 (1989). *See also*, *Stein v. Lukas*, 308 Ark. 74, 80–81, 823 S.W.2d 832, 835–36 (1992) (ruling in deceit case that "the appellee's claim for punitive damages should not be negated by the fact that the jury did not specify whether the underlying cause of action supporting [the compensatory award] lay in tort or breach of warranty").

The degree of proof required to support a punitive damages instruction is substantial evidence of actual or inferred malice. *Stein*, 308 Ark. at 78, 823 S.W.2d at 834. Malice can be inferred either from a conscious indifference to or from a reckless disregard of the consequence of one's actions. *Id.*, 823 S.W.2d at 834.

The definition of "clear and convincing evidence" in this instruction is a combination of two different formulations that have been recited by the Arkansas Supreme Court. In a number of cases and a variety of contexts, the court has stated the definition as: "proof that produces a firm conviction in you that the allegation is true." *E.g.*, *Carter v. Four Seasons Funding Corp.*, 351 Ark. 637, 653, 97 S.W.3d 387, 395 (2003) (usury claim); *Ward v. Williams*, 354 Ark. 168, 181, 118 S.W.3d 513, 521 (2003) (oral contract for sale of land); *Howell v. Scroll Techs.*, 343 Ark. 297, 304, 35 S.W.3d 800, 805 (2001) (workers' compensation); *Baker v. Ark. Dept. of Human Servs.*, 340 Ark. 42, 48, 8 S.W.3d 499, 503 (2000) (termination of parental rights). The court does not, however, appear to intend this definition to mean something different than other language it has recited ("proof so clear, direct, weighty, and convincing as to enable you to come to a clear conviction of the matter asserted") and in fact has sometimes included both formulations in the same opinion. *See, e.g.*, *Howell v. Scroll Techs.*, 343 Ark. at 304, 35 S.W.3d at 805; *Kelly v. Kelly*, 264 Ark. 865, 870, 575 S.W.2d 672, 675–676 (1979). The Committee combined language from both into a hybrid definition that appears to capture the essence of the principle.

The Committee added "the wrongdoer" to the second sentence of

the instruction to recognize the notion that punitive damages can serve to deter similar conduct by the tortfeasor as well as others. *Cf. Matthews v. Rodgers*, 279 Ark. 328, 336, 651 S.W.2d 453, 458 (1983) (punitive damages “must be sufficient not only to deter similar conduct on the part of the same tortfeasor but they must be sufficient to deter any others who might engage in similar conduct.”). Similar language was upheld in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 19 (1991), discussed below.

Punitive damages are not recoverable unless compensatory damages are also awarded. *Bell v. McManus*, 294 Ark. 275, 278A, 742 S.W.2d 559, 559 (1988). The Committee included an instruction for claims subject to Act 649 informing juries that punitive damages may be awarded only if the jury finds that plaintiff should recover compensatory damages. *See Ark. Code Ann. § 16-55-206* (2004) (“In order to recover punitive damages from a defendant, a plaintiff has the burden of proving that the defendant is liable for compensatory damages”). Whether such an instruction is appropriate in pre-Act 649 cases is unclear. *See generally Hale v. Ladd*, 308 Ark. 567, 826 S.W.2d 244 (1992); *Takeya v. Didion*, 294 Ark. 611, 745 S.W.2d 614 (1988); *Kroger Grocery & Baking Co. v. Reeves*, 210 Ark. 178, 194 S.W.2d 876 (1946). Several other jurisdictions include such an instruction. *E.g.*, *Tenn. Pattern Jury Instructions—3 Civil 14.55* (2003) (“You may consider an award of punitive damages only if you find that the plaintiff has suffered actual damages as a legal result of the defendant’s fault and you have made an award for compensatory damages.”); *N.M. Stat. Ann. Civil Unif. Jury Instructions 13-1827* (2003) (“You may consider punitive damages only if you find that ____ (party making claim) should recover compensatory [or nominal] damages.”).

The United States Supreme Court has recognized procedural and substantive constitutional limitations on the award of punitive damages. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996). The constitutionality of such awards in civil cases is evaluated under the Due Process Clause of the Fourteenth Amendment rather than the Eighth Amendment’s Excessive Fines Clause. *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 266 (1989) (Excessive Fines Clause does not apply to punitive damages awards in civil cases between private parties).

The Due Process Clause requires judicial review of the amount of punitive damages awards. *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 420 (1994). Jury instructions that “enlightened the jury as to the punitive damages’ nature and purpose, identified the damages as punishment for civil wrongdoing of the kind involved, and explained that their imposition was not compulsory,” together with adequate post-trial and appellate judicial review of the jury’s award, satisfy due process requirements. *Haslip*, 499 U.S. at 19 (1991) (upholding punitive damage award against insurance company under respondeat superior theory for fraudulent conduct of its agent). Arkansas’s law concerning

punitive damages has been held to satisfy the *Haslip* criteria. *Smith v. Hansen*, 323 Ark. 188, 200, 914 S.W.2d 285, 291 (1996) (discussing former AMI 2217); *Robertson Oil Co., Inc. v. Phillips Petroleum Co.*, 779 F. Supp. 994, 997–98 (W.D. Ark. 1991), *aff'd*, 14 F.3d 373 (8th Cir. 1993) (en banc), *overruled on other grounds by* *Cottier v. City of Martin*, 604 F.3d 553, 557 (8th Cir., 2010) (en banc). Appellate review of trial courts' post-trial rulings on the constitutionality of punitive damages awards is de novo. *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 431 (2001).

As a substantive matter, “[t]he Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.” *State Farm*, 538 U.S. at 415–418. The United States Supreme Court, in both *State Farm* and *Gore*, has articulated three factors or “guideposts” for courts to consider in determining whether a punitive damages award is “grossly excessive.” The Arkansas Supreme Court has ruled that these three guideposts are to be given equal weight. *Advocat, Inc. v. Sauer*, 353 Ark. 29, 54, 111 S.W.3d 346, 360 (2003). *But see* *Jim Ray, Inc. v. Williams*, 99 Ark. 315, 322, 260 S.W.3d 307, 311 (2007) (noting that reprehensibility is the most important guidepost) (citing *Gore*, 517 U.S. at 575).

The first guidepost is the degree of reprehensibility of the defendant’s misconduct, which the Court has characterized as “the most important indicium of the reasonableness of a punitive damages award.” *State Farm*, 538 U.S. at 418–19. The Court has articulated several considerations regarding reprehensibility. These include whether the harm was physical or economic, whether defendant’s conduct evinced reckless disregard for others’ rights or intentional wrongdoing, whether the conduct was an isolated incident or involved repeated wrongdoing, and whether the target of the misconduct was financially vulnerable. The Court has also taken into account, both as a matter of substantive due process and federalism, the extent of the nexus between the defendant’s misconduct and the state’s interest in punishing misconduct within its own borders. The addition to the Note on Use regarding a defendant’s lawful out-of-state conduct was necessitated by the Court’s explicit mandate in *State Farm*, as discussed in the Comment to AMI 2218A.

As indicated above, the Arkansas Supreme Court has repeatedly held that the defendant’s financial condition is an appropriate consideration for the jury in determining the amount of punitive damages. The United States Supreme Court, while not disapproving of an instruction to that effect, cautioned in its discussion of reprehensibility in *State Farm* that “[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.” 538 U.S. at 426–28.

The second guidepost is the disparity between the actual or

potential harm suffered by the plaintiff and the punitive damages award. The Court has noted that, although no rigid benchmark exists, few awards exceeding a single-digit ratio between compensatory and punitive damages will survive due process scrutiny. *Gore*, 517 U.S. at 581–83; *State Farm*, 538 U.S. at 425–26.

The third guidepost is the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *Gore*, 517 U.S. at 584; *State Farm*, 538 U.S. at 416–30.

For examples of the United States Supreme Court's application of the three guideposts, see *State Farm*, 538 U.S. at 416–30 (striking down as “grossly excessive” a \$145 million punitive damages award in bad faith action against an insurer involving \$1 million in compensatory damages for emotional distress; much of the conduct complained of occurred out of state and was lawful where it occurred; maximum civil fine for conduct was \$10,000); *Gore*, 517 U.S. at 576–586 (striking down as “grossly excessive” a \$4 million punitive damages award, reduced on appeal to \$2 million to eliminate that portion of the award based on lawful conduct that occurred outside of the forum state, for a BMW dealership's failure to disclose that a new car had been refinished, in which actual damages were only \$4,000). See also *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993) (plurality) (upholding \$10 million punitive damages award in case involving \$19,000 in actual damages; jury could have reasonably found that defendant engaged in malicious and fraudulent course of action, which could have caused millions of dollars in losses, as part of a larger scheme of fraud, trickery, and deceit). For an application of *State Farm* to jury instructions in a case involving an exceptionally high punitive damages award, see generally *In re the Exxon Valdez*, 296 F. Supp. 2d 1071 (D. Alaska 2004) (on remand from the Ninth Circuit for reconsideration under *State Farm*), *judgment vacated and remanded*, 490 F.3d 1066 (9th Cir. 2007), *judgment vacated*, 554 U.S. 471, 128 S.Ct. 2605 (2008).

As noted in *Routh Wrecker Service, Inc. v. Washington*, “[s]tate appellate courts that have considered the punitive damages issue in light of *Gore* have adopted a two-step analysis. The first step is to determine whether the award of punitives is excessive under state law; the next is to consider the award in light of the due-process analysis in *Gore*.” 335 Ark. 232, 239, 980 S.W.2d 240, 244 (1998). As a matter of Arkansas law, the court first considers “the extent and enormity of the wrong, the intent of the party committing the wrong, all the circumstances, and the financial and social condition and standing of the erring party.” *Id.*, 980 S.W.2d at 244. The standard of review on the issue of remittitur of punitive damages is “whether the verdict is so great as to shock the conscience of this court or to demonstrate passion or prejudice on the part of the trier of fact.” *Id.*, 980 S.W.2d at 244. See also *Advocat, Inc. v. Sauer*, 353 Ark. 29, 11 S.W.3d 346, *cert. denied*, 540 U.S. 1012 (2003).

(citing *Routh Wrecker Service, Inc.* and applying two-step process); *Allstate Ins. Co. v. Dodson*, 2011 Ark. 19 (same).

In *Advocat, Inc.*, the Arkansas Supreme Court reversed as excessive under the third guidepost a \$63 million punitive damages verdict—"far and away in excess of any other punitive damages award in this state." 353 Ark. at 58, 111 S.W.3d at 362. (The highest punitive damages award upheld by the Arkansas Supreme Court is \$3 million. See *Airco, Inc. v. Simmons First Nat'l Bank*, 276 Ark. 486, 638 S.W.2d 660 (1982). The highest affirmed by the Arkansas Court of Appeals is \$4 million. See *Arrow Int'l, Inc. v. Sparks*, 81 Ark. App. 42, 98 S.W.3d 48 (2003)). The *Advocat, Inc.* court found that a remittitur of punitive damages to \$21 million would be appropriate. Note that the court in *Advocat, Inc.* concluded, under the first two guideposts, that the reprehensibility of defendants' conduct was high and that a ratio of 4.2 times the amount of the compensatory damages (under the court's conclusion that a remittitur from \$15 million to \$5 million would be appropriate) was not "breathhtaking." 353 Ark. at 56, 111 S.W.3d at 361. For an Arkansas case upholding a 75:1 ratio under the *Gore* analysis, see generally *Routh Wrecker Service, Inc. v. Washington*, 335 Ark. 232, 980 S.W.2d 240 (1998) (upholding \$75,000 punitive damages award in abuse of process case in which \$1,000 compensatory damages were awarded). For a case in which the court of appeals modified the trial court's remittitur of punitive damages of \$4,500 (4.37:1) by increasing the punitive award to \$8,000 (8.77:1) because of the modest award of compensatory damages and the need to deter similar, future conduct, see generally *Graves v. Bullock*, 102 Ark. App. 197, 283 S.W.3d 615 (2008). For application of all three guideposts, see generally *Jim Ray, Inc.*, 99 Ark. 315, 260 S.W.3d 307.

Emphasizing the first two guideposts (reprehensibility and ratio) and acknowledging that the award would be excessive under the third (civil penalties authorized in comparable cases), the court reinstated a punitive damages award of \$15 million, which the trial court had remitted to \$6 million, in *Allstate Ins. Co. v. Dodson*, 2011 Ark. 19, at 33.

The "fair upper limit" of punitive damages awards in maritime cases is a 1:1 ratio. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 513 (2008). Justice Souter's opinion also includes a comprehensive general review of the history and purposes of punitive damages awards.

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AMI 2218A

**PUNITIVE DAMAGES—OUT-OF-STATE CONDUCT
AND HARM TO NON-PARTIES—CAUTIONARY
INSTRUCTIONS**

[You have heard evidence regarding _____
(defendant)'s
conduct outside the state of Arkansas. This evidence
may be considered by you only for the purpose of
determining the degree of reprehensibility of the
conduct by _____ that occurred in Arkansas. You
(defendant)
may not use evidence of _____ conduct outside of
(defendant)'s
Arkansas to punish _____ for conduct that was law-
(defendant)
ful in the state where it occurred and that has had no
impact on Arkansas or its residents.]

[You [also] have heard evidence that _____
(defendant)'s
conduct has harmed persons other than _____. This
(plaintiff)
evidence may be considered by you only for the
purpose of determining the degree of reprehensibility
of _____ conduct. You may not use evidence of
(defendant)'s
harm to persons other than _____ to punish _____.]
(plaintiff) (defendant)

NOTE ON USE

The first bracketed paragraph of this instruction is to be used only when evidence has been admitted of defendant's lawful out-of-state conduct.

The second bracketed paragraph of this instruction is to be given, upon request, when evidence has been admitted or argument introduced that defendant's conduct has caused harm to nonparties.

COMMENT

In some cases evidence of the defendant's out-of-state conduct may

be deemed admissible for some purposes (e.g., because relevant to a witness's credibility or to the defendant's state of mind), but of limited permissible applicability as a basis for punitive damages (e.g., as evidence of recidivism). For an example, see *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 796–98 (8th Cir. 2004). The first bracketed paragraph of this cautionary instruction responds to the constitutional concerns presented by such situations, as articulated in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003), which are discussed generally in the Comment to AMI 2218. Invoking principles of federalism, and the substantive due process requirement of a nexus between defendant's conduct and the specific harm suffered by plaintiff in the determination of the amount of a punitive damages award, the Court in *State Farm* stated that “[l]awful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff. A jury must be instructed, furthermore, that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred. 538 U.S. at 422. See also *Gore*, 517 U.S. at 572–573 (noting that a state “does not have the power . . . to punish [a defendant] for conduct that was lawful where it occurred and that had no impact on [the state] or its residents”).” *Id.*

A related problem involves evidence of in-state conduct causing harm to nonparties. The Court in *State Farm*, while stopping short of expressly mandating that a cautionary instruction must be administered to the jury, observed that: “A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages.” 538 U.S. at 423. The Court stated that the defendant is to be punished only “for the conduct that harmed the plaintiff, not for being an unsavory individual or business.” *Id.* Furthermore, inclusion of dissimilar harm to nonparties creates the risk of multiple punitive damages awards against the defendant for the same conduct because in the usual case nonparties are not bound by a judgment obtained by some other plaintiff. *Id.* (citing *Gore*, 517 U.S. at 593 (Breyer, J., concurring)). For an Arkansas case concluding that a punitive damages award, which may have been based in part on evidence of out-of-state harm, violated the defendant's due process rights, see *FMC Corp., Inc. v. Helton*, 360 Ark. 465, 477–78, 202 S.W.3d 490, 499–00 (2005). In *Williams*, Judge Morris Arnold parsed the due process distinction between harm to nonparties that was insufficiently similar to plaintiff's harm “to be evidence of recidivism under the narrow exception set forth in *State Farm*,” on the one hand, and evidence “that would fall within the *State Farm* recidivism exception,” on the other hand. 378 F.3d at 796–98 (8th Cir. 2004). In *Boerner v. Brown & Williamson Tobacco Co.*, which involved evidence of both out-of-state conduct and harm to nonparties, the court rejected the defendant's argument that AMI 2218 failed to satisfy *State Farm*. 394 F.3d 594, 603–04 (8th Cir. 2005). That conclusion was bolstered, however, by the

court's observation that there was no indication that the defendant's out-of-state behavior was lawful elsewhere. *Id.* Judge Bye's separate opinion objected that the Arkansas Model Jury Instructions did not sufficiently limit the jury's consideration to the harm suffered by the plaintiff. *Id.* at 606 (Bye, J., concurring).

The second bracketed paragraph of this instruction responds to *Philip Morris USA, Inc. v. Williams*, 549 U.S. 346, 353 (2007) ("*Philip Morris II*"), in which the Court explicitly extended *State Farm* to hold that "the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." (Note that the Court had previously remanded the \$79.5 million punitive damages award in light of *State Farm*, *Philip Morris USA, Inc. v. Williams*, 540 U.S. 801 (2003) ("*Philip Morris I*"); but the Oregon courts reinstated the award. The Oregon court again reinstated the award following remand from the Supreme Court, *Williams v. Philip Morris Inc.*, 344 Or. 45, 176 P.2d 1255 (2008) (adhering to prior Oregon Supreme Court ruling and affirming Oregon Court of Appeals decision on independent state law grounds), and the Supreme Court again granted a writ of certiorari, which it subsequently dismissed as improvidently granted. *Philip Morris USA v. Williams*, 129 S.Ct. 1436 (2009)). The Court also recognized in *Philip Morris II*, however, that evidence of actual harm or risk of harm to nonparties could be relevant to show that "the conduct that harmed the plaintiff also posed a substantial risk to the general public, and so was particularly reprehensible." 549 U.S. at 355. When there is "an unreasonable and unnecessary risk" that juries will confuse the constitutionally permissible purpose for which harm to nonparties may be considered (to determine reprehensibility) with the constitutionally prohibited one (to punish defendant for having caused injury to nonparties)—because such evidence or argument was introduced at trial—the trial court, "upon request, must protect against that risk," *Id.* at 357, presumably by giving a cautionary instruction. For an Arkansas case mentioning the distinction between consideration of harm to nonparties as evidence of reprehensibility and as a basis for punishing defendant, see *Jim Ray, Inc. v. Williams*, 99 Ark. 315, 322, 260 S.W.3d 307, 311 (2007). For a case reversing and remanding after *Philip Morris II* for a limiting punitive damages instruction concerning harm to nonparties, even though the trial court had given a limiting instruction regarding extraterritorial harm, see *White v. Ford Motor Co.*, 500 F.3d 963, 971–73 (9th Cir. 2007).

Research References

West's Key Number Digest
Damages ⇨215

Legal Encyclopedias
C.J.S., Damages §§ 444 to 445

AMI 2219

PURPOSE OF MORTALITY TABLES

In the event that you find that _____ is entitled to damages arising in the future because of *[injuries]* *[or] [future (medical) (caretaking) expenses]* *[or] [loss of earnings]* *[or] [loss of earning capacity]* *[or] [loss of contributions]*, you must determine the amount of these damages.

If these damages are of a continuing nature, you may consider how long they will continue. [If they are permanent in nature, then in computing these damages you may consider how long _____ is likely to live.]

[With respect to loss of future *(earnings)* *(earning capacity)* *(contributions)* you may consider that some persons work all their lives and others do not and that a person's earnings may remain the same or may increase or decrease in the future.]

Mortality tables are evidence of an average life expectancy of a person who has reached a certain age, but they are not conclusive. They may be considered by you in connection with other evidence relating to the probable life expectancy of _____, including evidence of *[his]**[her]* occupation, health, habits, and other activities, bearing in mind that some persons live longer than the average and some persons less than the average.

NOTE ON USE

The blank should be completed with the identification of the person whose life has been impacted by the claim, which may not in all cases be the named plaintiff.

COMMENT

St. Louis, I.M. & S.R. Co. v. Brogan, 105 Ark. 533, 151 S.W. 699 (1912), holds that mortality tables, as well as evidence of age, health, habits, etc., can be used to prove life expectancy. *See also* Abraham v. Jones, 228 Ark. 717, 310 S.W.2d 488 (1958).

On proof of life expectancy *see* Lawson v. Stephens, 241 Ark. 407, 407 S.W.2d 917 (1966). For judicial notice of mortality tables, *see* Bill Davis Trucking, Inc. v. Prysock, 301 Ark. 387, 391, 784 S.W.2d 755 (1990). For use of mortality tables based on testimony of a permanent injury, *see* Buckley v. Summerville, 2018 Ark. App. 100, 543 S.W.3d 534 (2018).

Research References

West's Key Number Digest
Damages \S 216(5)

Legal Encyclopedias
C.J.S., Damages $\S\S$ 426 to 427, 434 to 443

AMI 2220

PRESENT VALUE—DEFINITION

I have used the expression “present value” in these instructions with respect to certain elements of damage which you may find that will sustain in the future. This simply means that if you find that is entitled to recover any elements of damage which require you to determine their present value, you must take into consideration the fact that money recovered will earn interest, if invested, until the time in the future when these losses will actually occur. Therefore, you must reduce any award of such damages to compensate for the reasonable earning power of money.

NOTE ON USE

This instruction should be used when the phrase “present value” has been employed in the text of an instruction on elements of damage.

COMMENT

A plaintiff is not required to present expert testimony to prove the present value of future medical expenses. *J.E. Merit Constructors, Inc. v. Cooper*, 345 Ark. 136, 44 S.W.3d 336 (2001).

Research References

West's Key Number Digest
Damages ⇐212

Legal Encyclopedias
C.J.S., Damages §§ 441, 454

AMI 2221

FAIR MARKET VALUE—DEFINITION

When I use the expression “fair market value,” I mean the price that the _____ would bring on
(description of property)

the open market in a sale between a seller who is willing to sell and a buyer who is willing and able to buy after a reasonable opportunity for negotiations.

NOTE ON USE

This instruction should be used when it is necessary to define “fair market value” as used in some other instruction.

For eminent domain cases, use AMI 2006 for the definition of “fair market value.”

COMMENT

This instruction is based on *Southern Bus Co. v. Simpson*, 214 Ark. 323, 215 S.W.2d 699 (1948). This definition of fair market value was approved in *Minerva Enterprises Inc. v. Howlett*, 308 Ark. 291, 824 S.W.2d 377 (1992).

Research References

West's Key Number Digest
Damages ⇨ 217

Legal Encyclopedias
C.J.S., Damages § 431

AMI 2222

**MEASURE OF DAMAGES—DAMAGE TO
PROPERTY—GENERAL INSTRUCTION**

**[If you find for _____ on the question of liability
(plaintiff)
(against any party [he][she][it] is suing)] [If an inter-
rogatory requires you to assess the damage to the
property of _____], you must then fix the amount of
(plaintiff)
money which will reasonably and fairly compensate
[him][her][it] [for the following element of damage]
[for any of the following elements of damage] sus-
tained [if proximately caused by the (negligence)
(fault) of _____ (or _____)]:
(defendant)]**

[Here insert the element or elements].

**Whether [this element] [any of these elements] of
damage has been proved by the evidence is for you
to determine.**

NOTE ON USE

This instruction cannot be given in the form shown on this page. It must be completed by selecting the appropriate element or elements of damage from among AMI 2223 through 2229. The clause or clauses so selected should reflect the relevant items of damage and should be inserted between the two paragraphs of this instruction.

When the case is submitted on interrogatories which cover the question of proximate cause, then the final bracketed clause in the first paragraph referring to proximate cause should be omitted. *See Chapter 36, Illustrative Sets of Instructions, Part II.*

If a personal injury action includes damage to a motor vehicle, use AMI 2201 and 2210.


COMMENT

In a case involving damages to property, the appropriate element of damage from among AMI 2223 through 2229 must be given in the

format of this instruction, and it is error for the court to insert its own instruction. *Hanna Lumber Co. v. Neff*, 265 Ark. 462, 579 S.W.2d 95 (1979).

Research References

West's Key Number Digest

Damages  217

Legal Encyclopedias

C.J.S., Damages § 431

AMI 2223

**MEASURE OF DAMAGES—DAMAGE TO REAL
PROPERTY—PERMANENT**

**The difference in the fair market value of the land
[and its improvements] immediately before and im-
mediately after the occurrence.**

NOTES ON USE

This clause is to be inserted between the two paragraphs of AMI 2222 when the evidence justifies its use.

COMMENTS

This instruction embodies the usual measure of damages for a permanent injury to land: *Southern Ice & Utilities Co. v. Bryan*, 187 Ark. 186, 58 S.W.2d 920 (1933) (construction of a nuisance in a residential district); *St. Louis, I.M. & S. Ry. Co. v. Miller*, 107 Ark. 276, 154 S.W. 956 (1913) (overflow); *St. Louis, I.M. & S. Ry. V. Magness*, 93 Ark. 46, 123 S.W. 786 (1909) (diversion of stream); *St. Louis, I.M. & S. Ry. Co. v. Ayres*, 67 Ark. 371, 55 S.W. 159 (1900) (destruction of growing trees).

In some situations, such as damage to a well, it is a question for the jury whether the damage is permanent or temporary. The correct procedure is then to explain both measures of damages and leave the selection to the jury. *Benton Gravel Co. v. Wright*, 206 Ark. 930, 175 S.W.2d 208 (1943).

Research References

West's Key Number Digest
Damages ☞217

Legal Encyclopedias
C.J.S., Damages § 431

AMI 2224

**MEASURE OF DAMAGES—DAMAGE TO REAL
PROPERTY—TEMPORARY OR REPAIRABLE**

The reasonable expense of necessary repairs to any property which was damaged [plus compensation for any loss of its (*rental*) (*usable*) value during the time that _____ was deprived of its use].

(plaintiff)

NOTE ON USE

This clause is to be inserted between the two paragraphs of AMI 2222 when the evidence justifies its use. The bracketed reference to usable value should be used when the damaged portion of the property does not have a separate, ascertainable rental value, as, for example, a fence.

COMMENT

This instruction embodies the usual measure of damages for a temporary injury to land. *Benton Gravel Co. v. Wright*, 206 Ark. 930, 175 S.W.2d 208 (1943) (damage to a house); *Ross & Ross v. St. Louis, I.M. & S. Ry. Co.*, 120 Ark. 264, 179 S.W. 353 (1915) (damage to a pool used in the operation of a gin); *St. Louis & S.F. Ry. Co. v. Jones*, 59 Ark. 105, 26 S.W. 595 (1894) (destruction of a meadow, which had to be reseeded).

The question whether the damage is temporary or permanent may be submitted to the jury, or the court may decide the issue as a matter of law. *Felton Oil Co. v. Gee*, 357 Ark. 421, 182 S.W.3d 72 (2004); *State v. Diamond Lakes Oil Co.*, 347 Ark. 618, 66 S.W.3d 613 (2002). For the correct procedure when there is a jury question whether the damage is temporary or permanent, see Comment to AMI 2223.

Research References

West's Key Number Digest
Damages ◊217

Legal Encyclopedias
C.J.S., Damages § 431

AMI 2225

**MEASURE OF DAMAGES—DAMAGE TO REAL
PROPERTY—DESTRUCTION OF IMPROVEMENTS**

The reasonable cost of replacing the _____
(describe property)
[, taking into consideration its depreciation,] [plus
compensation for any loss of its *(rental)* *(usable)*
value during the time that _____ was deprived of its
(plaintiff)
use].

NOTE ON USE

This clause is to be inserted between the two paragraphs of AMI 2222 when the evidence justifies its use. The bracketed reference to usable value should be used when the damaged portion of the property does not have a separate, ascertainable rental value.

COMMENT

This instruction states the measure of damages when the property destroyed can be replaced in substantially the same condition. *Bush v. Taylor*, 130 Ark. 522, 197 S.W. 1172 (1917). Depreciation is to be considered. *Missouri Pac. R. Co. v. Wood*, 165 Ark. 240, 263 S.W. 964 (1924).

Research References

West's Key Number Digest
Damages ⚡217

Legal Encyclopedias
C.J.S., Damages § 431

AMI 2226

MEASURE OF DAMAGES—DAMAGE TO CROPS

The difference in the fair market value between the crop that the land would otherwise have produced and the crop that was actually produced, less the difference between what it would have cost to have produced, harvested, and marketed an undamaged crop and what it did cost to produce, harvest, and market the actual crop.

NOTE ON USE

This clause is to be inserted between the two paragraphs of AMI 2222 when the evidence justifies its use.

COMMENT

This instruction embodies the usual measure of damage for loss of annual crops. *St. Louis Southwestern Ry. Co. v. Ellis*, 169 Ark. 682, 276 S.W. 996 (1925); *St. Louis Southwestern Ry. Co. v. Morris*, 76 Ark. 542, 89 S.W. 846 (1905). As to perennial crops, several different measures of damages were discussed in *Missouri Pac. R. Co. v. Benham*, 192 Ark. 35, 89 S.W.2d 928 (1936).

When the crop is destroyed, the measure of damages is its market value at the time of the destruction. *St. Louis, I.M. & S. Ry. Co. v. Lyman*, 57 Ark. 512, 22 S.W. 170 (1893). But if the destroyed crop is too young to have a market value, and it is too late to plant another, the measure of damages is the rental value of the land. *St. Louis, I.M. & S. Ry. Co. v. Saunders*, 85 Ark. 111, 107 S.W. 194 (1908).

This instruction should not be given if the crop is not sufficiently mature to ascertain its value. In this situation the measure of damage is rental value of land. Whether the crop is sufficiently mature is a question for the jury. *Dickerson Const. Co., Inc. v. Dozier*, 266 Ark. 345, 584 S.W.2d 36 (1979).

The trial court may permit proof of "booking" or "futures" crop prices if such proof would not amount to speculation. In determining whether such proof amounts to speculation, the trial court should consider whether the claimant has "booked" sales in the futures market in the past, and whether the claimant has the capacity to manage the crop for predictable future delivery, e.g., irrigation capacity. *See McGraw v. Weeks*, 326 Ark. 285, 930 S.W.2d 365 (1996).

Research References

West's Key Number Digest
Damages ✠217

Legal Encyclopedias
C.J.S., Damages § 431

AMI 2226A

MEASURE OF DAMAGES—DAMAGE TO TREES OR GROWING TIMBER

The [fair market value of the timber cut] [difference in the fair market value of the land immediately before and immediately after the occurrence] [cost of replacement of the trees] [the value of the wood in a manufactured state] [plus the reasonable expense of necessary repairs to any property damaged].

NOTE ON USE

The appropriate clause is to be inserted between the two paragraphs of AMI 2222 when the evidence justifies its use. The final bracketed clause is not used where the plaintiff seeks damages for diminution in the fair market value of the land.

COMMENT

A plaintiff claiming damages for the wrongful removal of timber is presented with a number of options. Under Ark. Code Ann. § 18-60-102, the plaintiff may recover the value of the timber or the damage to the market value of the land. *Stoner v. Houston*, 265 Ark. 928, 582 S.W.2d 28 (1979). In cases involving ornamental or shade trees, damages are measured by the cost of replacing the damaged or destroyed trees plus the reasonable expense of any necessary repairs to any property damaged. *Worthington v. Roberts*, 304 Ark. 551, 803 S.W.2d 906 (1991). The use made of the land should be considered. *Id.* The evidence in each case will determine which instruction should be given. *Id.* The reasonable expense of necessary repairs can be recovered except in cases where damages are measured by the difference in the market value of the land immediately before and immediately after the occurrence.

In addition, the common law allows recovery of the value of the wood in the manufactured state less the cost of converting the timber to wood. *Burbridge v. Bradley Lumber Co.*, 218 Ark. 897, 239 S.W.2d 285 (1951). Where the defendant acted intentionally, it is not entitled to a reduction for the cost of manufacturing. *Bailey v. Hammonds*, 193 Ark. 633, 101 S.W.2d 785 (1937). The jury may be instructed on different theories but only one recovery is appropriate. *Peek v. Henderson*, 208 Ark. 238, 185 S.W.2d 704 (1945).

In certain situations, the intended use of the damaged or destroyed trees is a question for the jury. *King v. Powell*, 85 Ark. App. 212, 148

S.W.3d 792 (2004). In *Prendergast v. Craft*, 102 Ark. App. 237, 284 S.W.3d 104 (2008), the court approved an instruction awarding the fair market value of the timber cut plus the reasonable expense of necessary repairs to any property damaged.

In *Shamlin v. Quadrangle Enterprises, Inc.*, 101 Ark. App. 164, 272 S.W.3d 128 (2008) the court held that the Civil Justice Reform Act of 2003 does not evince an intent to alter the common law regarding actions for conversion brought under Ark. Code Ann. § 18-60-102 and therefore does not automatically apply to such actions. There, the court affirmed a decision to hold defendants jointly and severally liable for the fair market value of the timber cut and to apportion the award for the cost of restoring the damaged land.

An action for double damages may be brought under Ark. Code Ann. § 15-32-301 where a defendant acts knowingly. An action for treble damages is available under Ark. Code Ann. § 18-60-102 unless the defendant had probable cause to believe he owned the land or the trees cut. A plaintiff may also elect to recover punitive damages. *Travis Lumber Co. v. Deichman*, 2009 Ark. 299. A plaintiff may not recover both statutory enhanced double or treble damages and common law punitive damages where the elements for each recovery are the same. *Stoner, supra*.

Research References

West's Key Number Digest
Damages ⇨217

AMI 2227

**MEASURE OF DAMAGES—DAMAGE TO PERSONAL
PROPERTY**

The difference in the fair market value of *[his][her]*
(describe property) of the property] immediately before and
immediately after the occurrence. [In determining this
difference you may take into consideration the rea-
sonable cost of repairs.]

NOTE ON USE

This clause is to be inserted between the two paragraphs of either AMI 2201 or AMI 2222 when the evidence justifies its use. Use the bracketed last sentence only when there is evidence of the cost of repairs.

COMMENT

This instruction states the most common measure of damages for damage to personal property. *Nicholas v. Bingamon*, 219 Ark. 748, 244 S.W.2d 782 (1952); *General Fire Extinguisher Co. v. Beal—Doyle Dry Goods Co.*, 110 Ark. 49, 160 S.W. 889 (1913). In the first cited case an instruction permitting the jury to consider the cost of repairs was upheld. Evidence of cost of repairs to establish market value may be considered only when other competent evidence of market value is lacking and the cost of repairs evidence is the best available. *McDaniel v. Linder*, 66 Ark. App. 362, 990 S.W.2d 593 (1999), citing *Beggs v. Stalnaker*, 237 Ark. 281, 372 S.W.2d 600 (1963).

When the damaged property is not a total loss, the owner is entitled to recover the difference in the fair market value of the property immediately before and immediately after the damage occurred. *Minerva Enterprises Inc. v. Howlett*, 308 Ark. 291, 824 S.W.2d 377 (1992).

Loss-of-use damages are not recoverable for damage to personal property other than motor vehicles. *Southwestern Bell Telephone Co. v. Harris Co. of Fort Smith*, 353 Ark. 487, 109 S.W.3d 637 (2003).

Research References

West's Key Number Digest
Damages ¶217

Legal Encyclopedias
C.J.S., Damages § 431

AMI 2228

**MEASURE OF DAMAGES—DAMAGE TO PERSONAL
PROPERTY—NO SALVAGE**

The fair market value of *[his][her]* _____ immediately before the occurrence.
(describe property)

NOTE ON USE

This clause is to be inserted between the two paragraphs of either AMI 2201 or AMI 2222.

COMMENT

It is error to give this instruction in the absence of proof of fair market value. *Bank of Cabot v. Ray*, 279 Ark. 92, 648 S.W.2d 800 (1983).

When there is a total loss of property with no salvage value or no possibility of repair, the owner is entitled to recover the fair market value of the property immediately before the loss occurred. *Minerva Enterprises Inc. v. Howlett*, 308 Ark. 291, 824 S.W.2d 377 (1992).

Research References

West's Key Number Digest
Damages ¶217

Legal Encyclopedias
C.J.S., Damages § 431

AMI 2229

MEASURE OF DAMAGES—DAMAGE TO PERSONAL PROPERTY—CLOTHING OR PERSONAL EFFECTS

The fair value of any *[clothing] [personal effects]* that was *[were] [lost] [destroyed]*. In determining this value you need not try to arrive at its saleable value as secondhand *[clothing] [property]*, but you should consider its reasonable value to _____ for *[his][her]* own use, taking into account *[the original cost,] [the character of the materials,] [the extent to which the clothing had been used and would probably be suitable for future use,] [the reasonable cost of replacement,]* and other circumstances which under the evidence would affect its usable value to _____.

NOTE ON USE

This element is to be inserted between the two paragraphs of either AMI 2201 or AMI 2222 when the evidence justifies its use. Only the bracketed matter that is supported by evidence in the case should be used.

If the loss is of personal effects other than clothing, appropriate changes in the language should be made.

COMMENT

For clothing and personal property held for the use of the plaintiff, rather than for sale, the measure of damages is the value of the property for the plaintiff's use at the time it was damaged, and not its saleable value as second-hand goods. *Howard's Laundry and Cleaners v. Brown*, 266 Ark. 460, 585 S.W.2d 944 (1979) (quoting *Kimball v. Goldman*, 117 Ark. 446, 174 S.W. 1185 (1915)). *See also Cecil v. Headley*, 237 Ark. 400, 373 S.W.2d 136 (1963) (The personal items were a radio, bedsteads, ice box, table, heater, cook stove, phonograph, pants and shirts); *Phillips v. Graves*, 219 Ark. 806, 245 S.W.2d 394 (1952) (furniture, clothing and other household furnishings). For a somewhat similar rule with respect to property having no demonstrable market value, *see St. Louis, I.M. & S. Ry. Co. v. Dague*, 118 Ark. 277, 176 S.W. 138 (1915).

When the personal property that has been damaged is clothing,

home appliances or other personal items, the measure of damages is the fair value of the personal property. Fair value is determined by the reasonable value to the owner for his own use, which includes considerations of original cost, replacement cost, and the owner's past and future use of the items. *Minerva Enterprises Inc. v. Howlett*, 308 Ark. 291, 824 S.W.2d 377 (1992).

Research References

West's Key Number Digest
Damages ⇨217

Legal Encyclopedias
C.J.S., Damages § 431

165 AMI 2230 about mitigation and

**MITIGATION OF DAMAGES—REAL AND
PERSONAL PROPERTY**

If it becomes necessary for you to assess the damage to the property of _____, then in fixing the amount of money which will reasonably and fairly compensate *[him][her]*, you are to consider that a person whose *[property][business]* is damaged must use ordinary care *[to minimize existing damages][and][to prevent further damages][and][to avoid damages]*.

The burden of proving *[that a party claiming damages failed to use ordinary care (to minimize existing damages) (and) (to prevent further damages) (and) (to avoid damages)][and][the amount of damages that might have been avoided in the exercise of ordinary care]* is upon the party from whom damages are claimed.

NOTE ON USE

This instruction should be given only when there is evidence that a party claiming property damage has failed to mitigate damages.

It should immediately follow the last paragraph of AMI 2222.

COMMENT

"The doctrine of avoidable consequences limits the amount of damages in that a party cannot recover damages resulting from consequences which he could reasonably have avoided by reasonable care, effort or expenditure." *Bill C. Harris Const. Co. v. Powers*, 262 Ark. 96, 104-05, 554 S.W.2d 332, 336 (1977). The doctrine applies in both tort and contract cases. *S. Bldg. Servs., Inc. v. City of Fort Smith*, 2013 Ark. App. 306, at 10. "The burden of proving that a non-breaching party could have avoided some or all of the damages by acting prudently rests on the breaching party, not only on the question of causation of damages for failure to avoid harmful consequences, but also on the question of the amount of damage that might have been avoided." *Taylor v. George*, 92 Ark. App. 264, 273, 212 S.W.3d 17, 24 (2005).

This instruction deals with physical damage to real or personal property and should follow AMI 2222 with the appropriate insert from AMI 2223 through 2229. *Twin City Bank v. Isaacs*, 283 Ark. 127, 132, 672 S.W.2d 651, 653 (1984).

The court correctly refused giving this instruction where the plaintiff was seeking lost profits, and not physical damage to property. *Stacks v. Jones*, 323 Ark. 643, 647, 916 S.W.2d 120, 122-23 (1996).

Research References

West's Key Number Digest
Damages §214

Legal Encyclopedias
C.J.S., Damages § 430

AMI 2231

**MEASURE OF DAMAGES—MALICIOUS
PROSECUTION**

The reasonable expenses, including attorney fees, incurred by _____ in connection with the defense
(plaintiff)
of the prior [civil] [criminal] proceeding.

NOTE ON USE

This clause is to be inserted in AMI 2201, where applicable, where an issue of malicious prosecution is submitted. See AMI 413.

COMMENT

Expenses incurred in connection with the defense of the prior proceeding, which is the subject of the malicious prosecution action, includes attorney fees and other costs incurred. *Harold McLaughlin Reliable Truck Brokers, Inc. v. Cox*, 324 Ark. 361, 922 S.W.2d 327 (1996). Other elements of damage set forth in Chapter 22 may be also applicable.

Research References

West's Key Number Digest
Malicious Prosecution ~~¶~~72(5)

Legal Encyclopedias
C.J.S., Malicious Prosecution or Wrongful Litigation §§ 144 to 145

CHAPTER 23

INSURANCE

Table of Instructions

AMI

2301. Issues—Claim for Uninsured Motorist Coverage—Burden of Proof.
2302. This instruction has been deleted.
2303. Issues—Claim for Underinsured Motorist Coverage—Burden of Proof.
2304. Issues—Tort of Bad Faith by Insurance Company—Burden of Proof.
2305. Issues—Claim for Policy Limit Under Valued Policy Law—Burden of Proof.

AMI 2301

ISSUES—CLAIM FOR UNINSURED MOTORIST COVERAGE—BURDEN OF PROOF

_____ claims damages from _____ for injuries
(Plaintiff) (defendant)
arising out of a motor vehicle accident with _____
(uninsured or
_____ on _____
unidentified motorist) (date of accident).

_____’s claim against _____ is based on an in-
(Plaintiff) (defendant)
surance policy containing a provision for what is com-
monly known as “uninsured motorist coverage.”

_____ has the burden of proving [three] [four]
(Plaintiff)
[five] essential propositions:

First, that *[he][she]* sustained damages.

Second, that [_____] *[an unidentified motorist]* was negligent.
(uninsured motorist)

Third, that such negligence was a proximate cause of _____'s damages.
(plaintiff)

[Fourth, that an insurance policy issued by _____ for the benefit of _____ containing uninsured
(defendant) (plaintiff)
motorist coverage was in force on _____.]
(date of accident)

[Fifth, that, on _____, (_____) carried
(date of accident) (uninsured motorist)
no liability Insurance coverage and was driving a motor vehicle that was not covered by liability insurance) *(the unidentified motorist was a hit-and-run driver)*].

[If you find from the evidence in this case that each of these propositions has been proved, then your verdict should be for _____; but if, on the other
(plaintiff)
hand, you find from the evidence that any of these propositions has not been proved, then your verdict should be for _____.]
(defendant)

NOTE ON USE

This instruction should be used when there is no liability insurance coverage on the driver alleged to be at fault or the vehicle operated by that driver at all, or in a hit-and-run situation where the driver alleged to be at fault is unidentified. If there is liability insurance coverage available, but the limits are less than the damages claimed by the plaintiff, use AMI 2303.

When using this instruction, also use any instructions that may be necessary to address the issue of the uninsured motorist's fault in causing plaintiff's damages, such as AMI 302, AMI 501, any applicable

Specific Factor instructions from AMI Chapter 6, and any applicable Rules of the Road instructions from AMI Chapter 9.

Only use the hit-and-run alternatives in the second and fifth elements if the policy at issue provides uninsured motorist coverage for hit-and-run accidents.

Modify or supplement this instruction if additional issues must be resolved to establish coverage. For example, when the uninsured motorist is a hit-and-run driver and there is hit-and-run coverage, it may be necessary to instruct the jury that to hold the insurer liable they must find actual physical contact between the hit-and-run driver's vehicle and the vehicle in which the plaintiff was riding (or the person of the plaintiff).

This instruction is intended to be used in cases in which the uninsured motorist is not a party. If the uninsured motorist is a party, modify this instruction as appropriate.

Do not use the bracketed fourth element if the existence of an insurance policy providing uninsured motorist benefits to plaintiff as of the date of the accident is not in dispute.

Do not use the final bracketed paragraph when affirmative defenses such as negligence of the plaintiff are in issue, when there is also a claim against another joint tortfeasor defendant or a claim that a non-party is at fault under Ark. Code Ann. § 16-55-202, or when the case is submitted on interrogatories.

In the rare case involving coverage limits below the statutory minimum on the driver or the vehicle, modify the instruction accordingly.

COMMENT

See Ark. Code Ann. §§ 23-89-401 et seq., which applies, with the applicable insurance policy, to all uninsured motorist claims.

This instruction is intended to clarify for the jury the basic framework in uninsured motorist cases by identifying the elements of (1) damages, (2) fault of the uninsured motorist, (3) the existence of a policy containing uninsured motorist coverage, and (4) the fact that the motorist and vehicle were uninsured.

Although an uninsured motorist is one who either has no liability insurance or carries less than the amount required by law and is driving a vehicle covered either by no insurance or by less than the amount required by law, this instruction applies only to the usual situation in which there is a complete absence of insurance (or a hit-and-run driver), since cases involving coverage limits below the statutory minimum are very rare.

The case contemplated by this instruction is against the uninsured motorist coverage carrier only. Combination of the insured's claims against both the uninsured motorist and the uninsured motorist coverage carrier in the same action raises issues that are beyond the scope of this instruction. See the Comment to AMI 2303 for discussion of those issues in the context of underinsured motorist coverage, where they are more likely to arise.

The plaintiff must show that both the tortfeasor and the vehicle driven by the tortfeasor are uninsured. *Home Ins. Co. v. Harwell*, 263 Ark. 884, 568 S.W.2d 17 (1978) (vehicle); *Southern Farm Bureau Cas. Ins. Co. v. Gottsponer*, 245 Ark. 735, 434 S.W.2d 280 (1968) (driver); *Southwestern Underwriters Ins. Co. v. Miller*, 254 Ark. 387, 493 S.W.2d 432 (1973) (vehicle); see also *Throesch v. United States Fidelity and Guaranty Co.*, 255 F.3d 551 (8th Cir. 2001) (vehicle). Under Ark. Code Ann. §§ 23-89-401 and 23-89-402, a vehicle may be uninsured where the insurer is unable to pay due to insolvency.

Some claimants on uninsured motorist policies in the past have sought to invoke Ark. Code Ann. § 27-19-503, as amended by Ark. Acts 2003, Act No. 1043, which requires a motorist to file a certificate within ninety days of an accident proving that the motorist and the vehicle the motorist was operating were insured up to the statutory minimum and provides that, if the motorist fails to do so, there shall be a presumption that both the motorist and the vehicle were uninsured. See, e.g., *State Farm Mut. Auto. Ins. Co. v. Henderson*, 356 Ark. 335, 343-44, 150 S.W.3d 276, 280-281 (2004) (declining to reach argument); *Throesch*, 255 F.3d at 554-55 (rejecting argument under statute before the 2003 amendment, which provided presumption as to motorist only, not to vehicle). AMI 2302 was based on the statutory presumption. The Arkansas Supreme Court, however, explicitly rejected this theory in *Kelley v. USAA Casualty Ins. Co.*, 371 Ark. 344, 348, 266 S.W.3d 734, 738 (2007) (concluding that "the section is not now and never was a means to declare an unidentified and unknown driver and vehicle as uninsured for DF & A purpose or for any purpose"), although it did not mention AMI 2302. In light of *Kelley*, the Committee has deleted AMI 2302.

A policy requirement that the insured be "legally entitled to recover" from an uninsured motorist requires only a showing of fault by the uninsured motorist; therefore, the fact that no judgment can be rendered against the estate of an uninsured motorist due to failure to properly file a probate claim against the estate does not bar the uninsured motorist claim. *Hettel v. Rye*, 251 Ark. 868, 475 S.W.2d 536 (1972).

A motorist who carries at least the minimum amount of liability insurance required by law does not become an uninsured motorist if the policy limits become exhausted. *Payne v. Farm Bureau Mut. Ins. Co. of Arkansas, Inc.*, 298 Ark. 540, 768 S.W.2d 543 (1989).

The Arkansas Supreme Court has upheld uninsured motorist policy

provisions that require proof of actual physical contact between the insured's vehicle (or person) and a hit-and-run vehicle. *Kelley, supra*; *State Farm Mut. Auto. Ins. Co., supra*; *Ward v. Consolidated Underwriters*, 259 Ark. 696, 535 S.W.2d 830 (1976). The uninsured motorist statutes do not require uninsured motorist policies to provide coverage for hit-and-run accidents where it cannot be proved that the unidentified driver and vehicle are uninsured. Therefore, a restriction on that coverage such as the requirement of contact between the vehicles is valid. Hit-and-run coverage provisions providing uninsured motorist coverage for injuries "arising out of" physical contact with an uninsured vehicle do not limit coverage to injuries proximately caused by such contact, but include injuries causally connected with the contact. *State Farm Mut. Auto. Ins. Co. v. LaSage*, 262 Ark. 631, 559 S.W.2d 702 (1978) (injuries sustained when insured ran into a ditch while pursuing hit-and-run driver were not excluded by "arising out of" requirement).

The Court has also upheld "other-insurance" or "excess-escape" clauses which obligate a secondary insurer to pay benefits only to the extent that the secondary insurer's policy limits exceed the primary coverage. *Youngman v. State Farm Mut. Auto. Ins. Co.*, 334 Ark. 73, 971 S.W.2d 248 (1998).

The statute governing uninsured motorist coverage, which becomes part of the policies affected by it, requires that uninsured motorist coverage issued to a corporation also cover the corporation's employee who is "using" the insured vehicle at the time the accident occurs. *First Security Bank of Searcy v. Doe*, 297 Ark. 254, 760 S.W.2d 863 (1988). Like liability insurance, uninsured motorist coverage follows the vehicle. *Southern Farm Bureau Casualty Ins. Co. v. Shelter Mutual Ins. Co.*, 2016 Ark. App. 563, 506 S.W.3d 915 (2016) (policy insuring the vehicle provided primary uninsured motorist coverage, rather than policy insuring the driver).

For purposes of an uninsured/underinsured motorist coverage provision defining the insured as a person "occupying" the vehicle, a pedestrian struck by the vehicle is not, by virtue of that brief contact with the vehicle, "occupying" it. *Tunnel v. Progressive Northern Ins. Co.*, 80 Ark.App. 215, 95 S.W.3d 1 (2003).

A named-driver exclusion in a policy generally does not violate public policy and will be enforced in underinsured motorist claims. *Castaneda v. Progressive Classic Ins. Co.*, 357 Ark. 345, 166 S.W.3d 556 (2004). By contrast, the Court of Appeals has held that a government-owned vehicle exclusion was contrary to the public policy underlying the uninsured motorist statute and thus was void. *Cross v. State Farm Mut. Auto. Ins. Co.*, 2018 Ark. App. 98, 541 S.W.3d 495 (2018).

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AMI 2302**ISSUES—CLAIM FOR UNINSURED MOTORIST
COVERAGE—AFFIRMATIVE DEFENSE—BURDEN
OF PROOF**

This Instruction has been deleted. See the Comment to AMI 2301.

AMI 2303

ISSUES—CLAIM FOR UNDERINSURED MOTORIST COVERAGE—BURDEN OF PROOF

 claims damages from for injuries
(Plaintiff) (defendant)
arising out of a motor vehicle accident with
(underinsured
motorist) on . 's claim against is
(date of accident) (Plaintiff) (defendant)
based on an insurance policy containing a provision
for what is commonly known as "underinsured motor-
ist coverage." has the burden of proving [four]
(Plaintiff)
[five] essential propositions:

First, that[he][she] sustained damages.

Second, that was negligent.
(underinsured motorist)

Third, that such negligence was a proximate
cause of 's damages.
(plaintiff)

[Fourth, that an insurance policy issued by
 for the benefit of containing underin-
(defendant) (plaintiff)
sured motorist coverage was in force on .]
(date of accident)

[Fourth] [Fifth], that on ,
(date of accident) (underinsured motorist)
carried liability insurance in an amount insufficient to
fully pay for the damages resulting from a motor vehi-
cle accident for which is at fault.
(underinsured motorist)

[If you find from the evidence in this case that
each of these propositions has been proved, then
your verdict should be for ; but if, on the other
(plaintiff)

hand, you find from the evidence that any of these propositions has not been proved, then your verdict should be for _____.]

(defendant)

NOTE ON USE

Do not give the final bracketed paragraph when the case is submitted on interrogatories.

This instruction is intended to be used in cases in which the underinsured motorist is not a party (i.e., when the underinsured motorist's liability carrier has tendered the limits of that policy). If the underinsured motorist is a party, modify or supplement this instruction as appropriate.

Do not give the fourth bracketed paragraph if it is undisputed that the defendant failed to obtain the plaintiff's written rejection of underinsured motorist coverage as required by Ark. Code Ann. § 23-89-209(a)(1).

Use this instruction in an underinsured motorist case in addition to any instructions that may be necessary to address the issue of the underinsured motorist's fault in causing plaintiff's damages. For example, adapt this instruction as necessary for cases involving joint tortfeasors (see AMI 203) and give AMI 302, any applicable Special Factor Instruction from AMI Chapter 6, and any applicable Rules of the Road Instruction from AMI Chapter 9, as the case requires.

COMMENT

This instruction is intended to clarify for the jury the basic framework in underinsured motorist cases by identifying the elements of (1) damages, (2) fault on the part of the underinsured motorist, (3) the existence of a policy containing underinsured motorist coverage, and (4) the fact that the motorist was underinsured. See Ark. Code Ann. § 23-89-209. This instruction was approved as a correct statement of the law in *Pogue v. Transcontinental Ins. Co.*, 2010 Ark. 222.

The case contemplated by this instruction is against the underinsured motorist coverage carrier only. Combination of the insured's claims against both the tortfeasor and the underinsured motorist coverage carrier in the same action may raise issues that are beyond the scope of this instruction. On the one hand, to be bound by the insured's judgment against or settlement with the tortfeasor, the underinsured motorist coverage carrier must be made a party to the insured's action against the tortfeasor (at least if the underinsured motorist coverage

policy contains a "consent clause" providing that the carrier will not be bound by any settlement with or judgment against the underinsured motorist without its written consent). *Cf.* *Brinker v. Forrest City School Dist.* No. 7, 344 Ark. 171, 40 S.W.3d 265 (2001) (underinsured motorist coverage carrier that was severed, but not dismissed, from insured's action against the tortfeasor remained a party and therefore was bound by the verdict), *with* *Ross v. State Farm Mut. Auto. Ins. Co.*, 41 Ark. App. 75, 848 S.W.2d 948 (1993) (insured who notified underinsured motorist coverage carrier of action against tortfeasor and kept carrier current on proceedings was nevertheless required to relitigate issues of liability and damages against carrier because carrier was not made a party to the action against the tortfeasor). *See also* *MFA Mutual Ins. Co. v. Bradshaw*, 245 Ark. 95, 431 S.W.2d 252 (1968) (upholding validity of policy provision that no judgment in an action by insured against uninsured motorist shall be conclusive against the uninsured motorist coverage carrier without the carrier's written consent; case involved default judgment against tortfeasor); *Ross*, 41 Ark. App. at 78, 848 S.W.2d at 950 ("the fact that *Bradshaw* involved a defaulting defendant and involved UM coverage rather than UIM coverage does not, in our judgment, make a difference in the legal principle involved"). Also, in uninsured motorist cases, the court has ruled that (aside from any obligations imposed by a duty-to-cooperate clause in the policy) "an insured has the option of suing either his insurer or the uninsured motorist or both; also, that the insurer itself is not prevented from cross-complaining against the uninsured motorist, or proceeding by a separate action against an uninsured motorist after payment of a judgment in favor of its insured." *Home Ins. Co. v. Williams*, 252 Ark. 1012, 1014, 482 S.W.2d 626, 628 (1972).

On the other hand, combination in one action of claims against both the tortfeasor and the underinsured motorist coverage carrier, while avoiding a multiplicity of lawsuits, might raise a question concerning the admissibility of evidence of the tortfeasor's liability insurance. Under Ark. R. Evid. 403, "evidence relating to the existence of liability insurance is not ordinarily admissible because of its lack of relevance and its inherently prejudicial nature. . . . Such evidence should be admitted only when it is relevant to the issues." *Johnson Timber Corp. v. Sturdivant*, 295 Ark. 622, 645, 752 S.W.2d 241, 252 (1988) (not error for trial court to admit evidence of liability insurance, with limiting instruction, in motor vehicle accident case to show agency relationship among defendants). *See also* *Hively v. Edwards*, 278 Ark. 435, 437-438, 646 S.W.2d 688, 689-690 (1983) (upholding trial court's refusal to admit evidence of insurance in medical malpractice case). *Cf.* *Fed. R. Evid.* 411 (evidence of liability insurance not admissible to prove insured's negligence, but may be admissible for other purposes, such as proof of agency, ownership, or control, or witness bias).

The Arkansas Supreme Court has distinguished uninsured from underinsured motorist coverage: "Uninsured motorist coverage applies when a tortfeasor either has no insurance or has less than the amount required by law. Coverage is designed to guarantee a minimum recovery

equal to that amount. *Underinsured coverage* applies when the tortfeasor has at least the amount of insurance required by law, but not enough to fully compensate the victim. This coverage is designed to provide compensation to the extent of the injury, subject to the policy limit." *Clampit v. State Farm Mut. Auto. Ins. Co.*, 309 Ark. 107, 109–110, 828 S.W.2d 593, 595 (1992). *See also* *State Farm Mut. Auto. Ins. Co. v. Beavers*, 321 Ark. 292, 901 S.W.2d 13 (1995) (*underinsured motorist coverage did not apply when insured struck by uninsured motorist and policy clearly distinguished between the two kinds of coverage*); *State Farm Mut. Auto. Ins. Co. v. Thomas*, 316 Ark. 345, 871 S.W.2d 571 (1994) (upholding underinsurance policy requirement that limits of tortfeasor's liability insurance are to be "used up" before underinsurance coverage applied). Thus, the obligation to pay underinsured motorist benefits does not arise until it is established that the tortfeasor was indeed underinsured, a determination which "necessarily entails knowing the extent of the insured's damages and the liability benefits that have been paid by the tortfeasor's carrier." *Hartford Ins. Co. of Midwest v. Mullinax*, 336 Ark. 335, 341, 984 S.W.2d 812, 815 (1999). In addition, "the *limits* of the liability coverage from the tortfeasors must be paid in full before the insured is entitled to underinsurance benefits." *Id.* (citing *Birchfield v. Nationwide Ins.*, 317 Ark. 38, 875 S.W.2d 502 (1994) (upholding underinsurance policy provision requiring "exhaustion by payments" of all other liability insurance)).

Although the Civil Justice Reform Act of 2003 did away with joint liability in personal injury, medical injury, property damage and wrongful death cases (Ark. Code Ann. § 16-55-201(a)), it did not amend the underinsured motorist statute's requirement that the limits of the liability coverage be exhausted before the insured is entitled to underinsurance benefits. Accordingly, *Birchfield* is still controlling. *Corn v. Farmers Ins. Co.*, 2013 Ark. 444, 6–9. The court, however, "strongly encourage[d]" the General Assembly to revisit the underinsured motorist statute and the joint-and-several-liability modification statute to address whether, given the modification of joint and several liability, it is unreasonable to require exhaustion of all liability policies in a multiple-tortfeasor case before underinsured motorist coverage is triggered, and to address other issues likely to evolve. *Id.* at 8–9.

Section 23-89-209 provides for "add-on" benefits rather than "difference-of-limits" benefits. *American Cas. Co. of Reading, Pa. v. Mason*, 312 Ark. 166, 848 S.W.2d 392 (1993); *Henderson v. Universal Underwriters Ins. Co.*, 768 F. Supp. 688 (E.D. Ark. 1991). The Arkansas Supreme Court has interpreted a policy requirement that the insured be "legally entitled to recover" from an *uninsured* motorist to require only a showing of fault by the uninsured motorist, *Hettel v. Rye*, 251 Ark. 868, 475 S.W.2d 536 (1972) (dismissal of claim against estate of uninsured motorist for failure to file copy of complaint in probate proceedings did not preclude uninsured motorist coverage); and the Arkansas Court of Appeals has applied the *Hettel* reasoning to *underinsured* motorist coverage. *Southern Farm Bureau Cas. Ins. Co. v. Pettie*, 54 Ark. App. 79, 924 S.W.2d 828 (1996) (neither exclusive remedy doc-

trine of workers' compensation law nor expiration of limitations period in favor of underinsured motorist prevented insured employee from being "legally entitled to recover" from underinsured motorist).

Stacking of underinsured motorist coverage is not prohibited by the statute but may be precluded by an applicable anti-stacking clause in the policy, and the court has upheld such exclusions. *E.g.*, *Chamberlin v. State Farm Mut. Auto. Ins. Co.*, 343 Ark. 392, 36 S.W.3d 281 (2001); *Smith v. Prudential Property and Cas. Ins. Co.*, 340 Ark. 335, 10 S.W.3d 846 (2000); *Clampit v. State Farm Mut. Auto. Ins. Co.*, 309 Ark. 107, 828 S.W.2d 593 (1992); *Shelter Mut. Ins. Co. v. Williams*, 69 Ark. App. 35, 9 S.W.3d 545 (2000); *Kanning v. Allstate Ins. Companies*, 67 Ark. App. 135, 992 S.W.2d 831 (1999).

Underinsurance coverage up to the minimum statutory amount (\$25,000 under Ark. Code Ann. § 27-19-605) will be implied if the insurer fails to obtain written rejection of the coverage as required by Ark. Code Ann. § 23-89-209(a)(1); and, if the insured has more than one car insured under the same policy, the insured will be allowed to "stack" such implied minimum coverage with respect to each vehicle if such stacking is not precluded by the policy. *Ross v. United Services Auto. Ass'n*, 320 Ark. 604, 899 S.W.2d 53 (1995) (anti-stacking provision in question precluded stacking of policies, but not stacking of vehicles within the policy).

A policy requirement that the injury was "caused by an accident arising out of the operation, maintenance or use of an underinsured motor vehicle" was held to require neither "but for" nor proximate causation, at least when the injury was inflicted by the underinsured vehicle itself. *Hisaw v. State Farm Mut. Auto. Ins. Co.*, 353 Ark. 668, 122 S.W.3d 1 (2003) (injury caused when door of underinsured motor vehicle, which had previously run off the road, swung shut and struck fire chief as he was inspecting vehicle). The term "use" was held to be ambiguous, presenting a jury question on that issue as well as the issue of causation.

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AMI 2304

ISSUES—TORT OF “BAD FAITH” BY INSURANCE
COMPANY—BURDEN OF PROOF

 claims damages from for “bad faith”
(Plaintiff) (defendant)
and has the burden of proving each of three essential
propositions:

First, that [he] [she] sustained damages;

Second, that acted in bad faith in an at-
(defendant)
tempt to avoid liability under its policy issued to
 ;
(plaintiff)

And third, that such conduct proximately caused
damage to .
(plaintiff)

“Bad faith” is not the mere failure or refusal to
pay a claim. “Bad faith” requires affirmative miscon-
duct, without a good faith defense. The affirmative
misconduct must be dishonest, oppressive, or car-
ried out with a state of mind characterized by hatred,
ill will, or a spirit of revenge.

[If you find from the evidence in this case that
each of these propositions has been proved, then
your verdict should be for ; but if, on the other
(plaintiff)
hand, you find that any of these propositions has not
been proved, then your verdict should be for .]
(defendant)

NOTE ON USE

Do not use the final bracketed paragraph when the case is submit-
ted on interrogatories.

COMMENT

This instruction is based on elements that the Arkansas Supreme Court has articulated in a series of cases, which originated in tort actions against liability insurers for bad-faith failure to settle within policy limits claims brought against their insureds (i.e., third-party cases). The court subsequently extended the cause of action to include claims for bad-faith failure to pay benefits owed under first-party insurance policies. The background to and elements of such claims are described in *Findley v. Time Ins. Co.*, 64 Ark. 647, 655, 573 S.W.2d 908, 912 (1978) (declining in major medical insurance case to “reject the possibility that an insurer may be liable in tort” for bad-faith conduct to avoid liability, but leaving the question “to the future” because insurer’s alleged misconduct—failure to investigate the insured’s claim and to explain the reasons for denial of coverage—did not amount to bad faith in any event). The court subsequently applied those elements to a first-party insurance case in *Aetna Cas. & Sur. Co. v. Broadway Arms Corp.*, 281 Ark. 128, 133–34, 664 S.W.2d 463, 465–66 (1984) (adopting elements in fire insurance case; concluding that bad faith was question for jury).

A distinct cause of action in tort for bad-faith failure to perform contractual obligations is available under Arkansas law only against insurers for misconduct seeking to avoid liability under an insurance policy. *Country Corner Food & Drug, Inc. v. First State Bank*, 32 Ark. 645, 655, 966 S.W.2d 894, 898–99 (1998) (rejecting bad-faith claim against lender). Arkansas law does not recognize a distinct cause of action in tort or contract for breach of the implied covenant of good faith and fair dealing outside of the insurance context. *Arkansas Res. Med. Testing, L.L.C. v. Osborne*, 2011 Ark. 158 at 3–6. For further discussion of this distinction, see the Comment to AMI 2426.

The court has stated that to constitute bad faith, the insurer’s “misconduct must be dishonest, malicious, or oppressive in an attempt to avoid its liability under an insurance policy.” *Aetna Cas. & Sur. Co.*, 281 Ark. at 133, 664 S.W.2d at 465 (1984). The court has defined “actual malice” as “that state of mind under which a person’s conduct is characterized by hatred, ill will or a spirit of revenge.” *Id.* at 133–34, 664 S.W.2d at 465. For the sake of simplification and juror comprehension, the Committee has substituted the definition of “actual malice” in the instruction for the term itself.

It is unsettled in Arkansas whether a health maintenance organization is liable in tort for bad faith failure to pay claims. Although noting that the tort of bad faith is limited to insurers and that an HMO differs from an insurer to the extent that it is not regulated by the state insurance code, the court declined to answer the question in *American Health Care Providers, Inc. v. O’Brien*, 318 Ark. 438, 441, 886 S.W.2d 588, 590 (1994), concluding instead that the HMO’s conduct did not rise

to the level of bad faith. It is also “questionable” whether one who has subcontracted with a principal has “a cause of action for bad faith against the principal’s surety or bonding company.” *R.J. Bob Jones Excavating Contractor, Inc. v. Firemen’s Ins. Co. of Newark, N.J.*, 324 Ark. 282, 289–90, 920 S.W.2d 483, 487 (1996) (concluding that court need not decide question because tort not proved in any case); *Williams v. Joyner-Cranford-Burke Const. Co.*, 285 Ark. 134, 138–39, 685 S.W.2d 503, 506 (1985) (affirming summary judgment for defendant on subcontractor’s bad-faith claim because the complaint failed to assert an “affirmative” action by defendants that would have amounted to bad faith).

The Arkansas Supreme Court has held that bad-faith claims arising out of employee benefit plans covered by the Employee Retirement Income Security Act, 29 U.S.C.A. § 1001 et seq. (“ERISA”), are preempted by the Act’s express preemption clause, 29 U.S.C.A. § 1144(a), and are not salvaged by its savings clause, 29 U.S.C.A. § 1144(b)(2)(A). *Selmon v. Metropolitan Life Ins. Co.*, 372 Ark. 420, 426, 277 S.W.3d 196, 202 (2008). *See generally*, Thomas Fox, et al., *Health Care Fin. Transactions Man.* § 20:16 (2013) (stating that, “ERISA has generally been found to preempt state laws prohibiting unfair or ‘bad faith’ claims practices by insurance companies on the basis that such laws do not specifically regulate insurance and as such are not saved from preemption”).

The Arkansas Supreme Court collected examples of cases illustrating what conduct does and does not constitute bad faith in *State Auto Property and Cas. Ins. v. Swaim*, 338 Ark. 49, 991 S.W.2d 555 (1999):

[The court has held that] nightmarish red tape, an abrupt attitude evidenced by an insurance representative about higher premium costs following cancellation of a group policy, and confusion over the referral process did not amount to bad faith. *See American Health Care Providers v. O’Brien*, *supra* [318 Ark. 438, 886 S.W.2d 588 (1994)]. Nor did the fact that an insurance company waited three months to investigate a claim. *See Reynolds v. Shelter Mut. Ins. Co.*, 313 Ark. 145, 852 S.W.2d 799 (1993).

Examples of cases where [the court has] found substantial evidence of bad faith include where an insurance agent lied by stating there was no insurance coverage (*Southern Farm v. Allen*, *supra* [326 Ark. 1023, 934 S.W.2d 527 (1996)]); aggressive, abusive, and coercive conduct by a claims representative, which included conversion of the insured’s wrecked car (*Viking Insurance Co. v. Jester*, 310 Ark. 317, 836 S.W.2d 371 (1992)); and where a carrier intentionally altered insurance records to avoid a bad risk (*Employers Equitable Life Ins. Co. v. Williams*, 282 Ark. 29, 665 S.W.2d 873 (1984)).

Swaim, *supra*, 338 Ark. at 58, 991 S.W.2d at 560–61, *quoted in*

Columbia Nat'l Ins. v. Freeman, 347 Ark. 423, 429, 64 S.W.3d 720, 723 (2002). In *Swaim*, the court concluded that foot-dragging in payment and the insurer's use of multiple adjusters (and resultant confusion about whether the insureds should have discarded items of personal property) did not constitute substantial evidence of bad faith. 338 Ark. at 59, 991 S.W.2d at 723. In *Freeman*, the court found substantial evidence of bad faith in the insureds' proof that a fire insurance carrier failed to pay their ongoing business expenses after they had provided requested documentation, failed to fulfill a promise to provide a temporary location for their business, failed to pay for agreed-to repairs, deliberately altered their file, falsely accused them of being uncooperative, and chose the lesser of two appraisals. 347 Ark. at 430–31, 64 S.W.3d at 723–25. See also *Unum Life Ins. Co. of America v. Edwards*, 362 Ark. 624, 629–30, 210 S.W.3d 84, 89 (2005) (distinguishing *Freeman* on the ground that Unum had not denied Edwards's claim for failure to provide adequate documentation but for the failure of the documentation she did provide to establish her disability). In *Hortica-Florists' Mut. Ins. Co. v. Pittman Nursery Corp.*, 729 F.3d 846, 855 (8th Cir. 2013), the court ruled that, even assuming the insured had a right under Arkansas law to select its own counsel if the insurer-appointed counsel had a conflict of interest, the insured's failure to offer evidence that the insurer chose defense counsel "out of malice or dishonesty," or that the insured's inability to choose its own counsel "proximately caused its harm," defeated the insured's bad-faith and negligence claims. For an extensive catalogue of actions held to constitute bad faith and held not to constitute bad faith, see Nathan Price Chaney, *A Survey of Bad Faith Insurance Tort Cases in Arkansas*, 64 Ark. L. Rev. 853, 879–86 (2011).

It is unclear whether or in what circumstances, even if its conduct does not constitute bad faith, an insurer may be held liable for negligent failure to perform its obligations under the policy—especially in first-party cases. In a third-party case, the court stated that "[i]t is well established in this state that an insurer is liable to its insured for any judgment in excess of the insured's policy limits if the insurer's failure to settle the claim was due to fraud, bad faith, or negligence." *Members Mut. Ins. Co. v. Blissett*, 254 Ark. 211, 215, 492 S.W.2d 429, 432 (1973). Further, in a case involving a claim for bad-faith refusal to pay first-party insurance benefits, the court stated that, "[a]lthough an insurer's actions, or inaction as the case may be, may not amount to a claim for bad faith, those same actions or inactions may support a claim in contract for non-performance (breach of contract) or a claim for defective performance (negligence)." *Reynolds v. Shelter Mut. Ins. Co.*, 313 Ark. 145, 149–50, 852 S.W.2d 799, 802–03 (1993). In *Farm Bureau Ins. Co. of Arkansas, Inc. v. Running M Farms, Inc.*, however, the court agreed with Farm Bureau's argument that Running M's theory of recovery—negligent performance of an insurance contract—"has not been adopted in this state." 366 Ark. 480, 490, 237 S.W.3d 32, 40 (2006). The court explained that Running M's tort claim amounted to one for "nonfeasance," which, citing *Findley*, the court said Arkansas "has never recognized." *Id.*, 366 Ark. at 491, 237 S.W.3d at 40. The court also

stated that the language quoted above from *Reynolds* “clearly denotes that Arkansas has not recognized a tort for mere nonperformance by an insurance carrier.” *Id.*, 366 Ark. at 492, 237 S.W.3d at 41. At a minimum, *Findley* and *Running M Farms* seem to stand for the proposition that the mere failure to timely satisfy the insured’s claims under the policy is not actionable in tort. The precise boundary between “nonfeasance” and “mifeasance” in negligence cases against insurers otherwise is difficult to determine. Some commentators, the language from *Reynolds v. Shelter Mut. Ins. Co.* notwithstanding, have suggested that negligence claims do not lie in the first-party context. *See generally*, Chaney, *supra*, at 879–86; Howard W. Brill & Christian H. Brill, 1 Arkansas Law of Damages §§ 24:3-4 (5th ed. 2013).

Research References

West’s Key Number Digest
Insurance Ⓒ3379, 3579

Legal Encyclopedias
C.J.S., Insurance §§ 2177 to 2179

AMI 2305

**ISSUES-CLAIM FOR POLICY LIMIT UNDER
VALUED POLICY LAW-BURDEN OF PROOF**

 contends that the building in question was
(Plaintiff)
a total loss by *(fire) (natural disaster)*. has the
(Plaintiff)
burden of proving this contention.

A building is a “total loss” if it is so far destroyed that no substantial part of it remains in place that is capable of being utilized in restoring the building to its condition before the *(fire) (natural disaster)*.

On the other hand, there is no total loss if the part of the building left standing is reasonably suited for use in restoring the building to its condition before the *(fire) (natural disaster)*.

Whether or not the part of the building left standing is reasonably suited for use in restoring the building to its condition before the *(fire) (natural disaster)* depends on whether a reasonably prudent owner, who is uninsured and desires to restore the building as it was before the *(fire) (natural disaster)*, would utilize the part remaining in restoring the building to its previous condition.

NOTE ON USE

Use this instruction when the plaintiff claims that a building damaged by fire or natural disaster is a total loss, thereby entitling the plaintiff to recover the entire policy limit for the structure coverage under the Arkansas valued policy statute, Ark. Code Ann. § 23-88-101.

Use the bracketed word “fire” where the loss is by fire, and “natural disaster” where the loss is by a natural disaster.

Do not use this instruction when the loss involves personal prop-

erty or detached or appurtenant structures. Ark. Code Ann. § 23-88-101(b). Also, do not use this instruction when the claim is made under a policy of flood or earthquake insurance. Ark. Code Ann. § 23-88-101(a).

COMMENT

Instructions virtually identical to this instruction were approved in *Phoenix Assur. Co. v. Loetscher*, 215 Ark. 23, 26-27, 219 S.W.2d 629, 631 (1949), and *St. Paul Fire & Marine Ins. Co. v. Green*, 181 Ark. 1096, 1103-1104, 29 S.W.2d 304, 307 (1930). This definition is also found in *Conley v. Fidelity-Phenix Fire Ins. Co. of New York*, 102 F. Supp. 474, 477 (W.D. Ark. 1952).

CHAPTER 24

CONTRACTS

Table of Instructions

CONTRACT FORMATION

AMI

- 2401. Issues—Breach of Contract.
- 2402. Issues—Contract Formation.
- 2403. No Dispute as to Existence of Contract.
- 2404. Contract Express or Implied.
- 2405. Definition—Offer and Acceptance.
- 2406. Definition—Consideration.
- 2407. Definition—Reasonably Certain.
- 2408. Duration of Offer.
- 2409. Counteroffer.
- 2410. Issues—Breach of Contract—Third Party Beneficiary Status—Issue of Fact.
- 2411. Issues—Breach of Contract—Third Party Beneficiary Status—Not an Issue of Fact.

CONTRACT INTERPRETATION

- 2412. Contract Interpretation—General Rule—Ambiguity in Language.
- 2413. Contract Interpretation—Ordinary Meaning.
- 2414. Contract Interpretation—Words or Phrases of a Particular Trade or Occupation.
- 2415. Contract Interpretation—Course of Performance.
- 2416. Contract Interpretation—Course of Dealing.
- 2417. Contract Interpretation—Custom in the Trade.
- 2418. Contract Interpretation—Construction of Express Terms, Course of Dealing, and Custom in the Trade.
- 2419. Contract Interpretation—Language of the Contract Should Be Interpreted as a Whole.
- 2420. Contract Interpretation—Contract Composed of More Than One Document.
- 2421. Contract Interpretation—Specific and General Provisions.

AMI

- 2422. Contract Interpretation—Written or Typewritten Provisions Control Provisions of Preprinted Forms.
- 2423. Contract Interpretation—Time Not Expressed—Reasonable Time.
- 2424. Contract Interpretation—Construction Against One Who Drafted Contract.

PERFORMANCE OR BREACH

- 2425. Modification of Contract.
- 2426. Contract's Implied Duty of Good Faith.
- 2427. Breach.
- 2428. Substantial Performance.
- 2429. Tender.

DEFENSES

- 2430. Defense—Cancellation.
- 2431. Defense—Accord and Satisfaction.
- 2432. Defense—Release.
- 2433. Defense—Fraud in Inducement.
- 2434. Defense—Undue Influence.
- 2435. Defense—Duress.
- 2436. Defense—Waiver—General Rule.
- 2437. Defense—Waiver of Breach by Acceptance of Benefits.
- 2438. Defense—Estoppel.
- 2439. Defense—Impossibility of Performance.
- 2440. Defense—Disabling Illness.
- 2441. Defense—Plaintiff's Prevention of Performance.

DAMAGES

- 2442. Damages—General Rule.
- 2443. Damages—Consequential Damages—Tacit Agreement Rule.

PROMISSORY ESTOPPEL

- 2444. Issues—Promissory Estoppel.
- 2445. Issues—Unjust Enrichment—Restitution Implied in Fact

CONTRACT FORMATION

AMI 2401

ISSUES—BREACH OF CONTRACT

 claims that breached a contract and
[Plaintiff] [defendant]
has the burden of proving each of four essential
propositions:

First, that and entered into a
[plaintiff] [defendant]
contract;

Second, that the contract required to
[defendant]
perform or not to perform a certain act;

Third, [that did what the contract required
[plaintiff]
of (him) (her) (it)] [that 's performance was
[plaintiff]
excused]; and

Fourth, that did not do what the contract
[defendant]
required of [him][her] [it].

[If you find that the has proved each of
[plaintiff] [defendant]
these propositions, then your verdict should be for
[plaintiff]. If, however, has failed to prove any one
[plaintiff]
or more of these propositions, then your verdict
should be for .]
[defendant]

NOTE ON USE

Use the appropriate bracketed portion of the third element. If the second portion of the third element is used, also use AMI 2427.

The final bracketed paragraph of the instruction should not be given when the case is submitted on interrogatories.

When a party seeks damages, also use AMI 2442.

Use AMI 2428 with this instruction when there is an issue as to substantial performance.

If nominal damages are appropriate, refer to AMI 419 and modify that instruction for use in a contract case. If actual or liquidated damages are sought, refer to AMI 2442.

COMMENT

Any nonperformance of a duty under a contract is a breach. *See* Aon Risk Servs., Inc. v. Meadors, 100 Ark. App. 272, 285, 267 S.W.3d 603, 612 (2007) (citing RESTATEMENT (SECOND) OF CONTRACTS).

Under Arkansas law, actual damage caused by the breach is not an essential element of a claim for breach of contract because a plaintiff is entitled to recover nominal damages in the absence of proof of actual damages. *See* Crumpacker v. Gary Reed Constr., Inc., 2010 Ark. App. 179, at 3 (“proof of causation is not an element of a claim for breach of contract or breach of implied warranty of habitability”); Dawson v. Temps Plus, Inc., 337 Ark. 247, 258–59, 987 S.W.2d 722, 728–29 (1999) (reversing damages award for failure of proof but instating nominal damages); Dilley v. Thomas, 106 Ark. 274, 280, 153 S.W. 110, 112 (1913) (reversing award of liquidated damages as penalty and entering judgment for nominal damages); W. Union Telegraph Co. v. Aubrey, 61 Ark. 613, 616, 33 S.W. 1063, 1064 (1896) (“Nominal damages may be recovered for the bare infringement of a right, or for a breach of contract unaccompanied by any actual damage.”); Blair v. United States, 150 F.2d 676, 678 (8th Cir. 1945) (“while the breach of contract gives rise to a right of action, it is nevertheless possible for a breach to occur without causing damage,” and in such instances, recovery is limited to nominal damages).

Research References

West's Key Number Digest
Contracts ⚡353(8)

Legal Encyclopedias
C.J.S., Contracts §§ 1034, 1058, 1065

AMI 2402

ISSUES—CONTRACT FORMATION

To establish [a] [an implied] contract, _____ has the burden of proving each of three essential propositions:

First, that _____ made an offer to enter into a contract that was accepted by _____;

Second, that there was an exchange of consideration; and

Third, that at the time the contract was made, its essential terms were reasonably certain and agreed to by both _____ and _____.

NOTE ON USE

Use the bracketed language “an implied” when a party alleges that his contract was implied.

If there is no dispute as to the existence of a contract between the parties, use AMI 2403.

COMMENT

The essential elements of a contract under Arkansas law include (1) competent parties, (2) subject matter, (3) legal consideration, (4) mutual agreement, and (5) mutual obligations. *Daimler-Chrysler Corp. v. Smelser*, 375 Ark. 216, 289 S.W.3d 466 (2008). “Whether or not there was a meeting of the minds is an issue of fact.” *Id.* at 219. However, certain elements of a valid contract—subject matter, legal consideration, mutuality of obligation—are matters of law for the court to decide. *See Bene v. New York Life Ins. Co.*, 191 Ark. 714, 87 S.W.2d 979 (1935) (subject matter); *Showmethemoney Check Cashiers v. Williams*, 342 Ark. 112, 119–22, 27 S.W.3d 361, 365–67 (2000) (mutuality of obligation). Only those elements of a contract that generally present fact questions for the jury are set forth in this instruction.

The mutual agreement, i.e., the meeting of the minds, required to

form a contract is judged objectively, not subjectively. *See Williamson v. Sanofi Winthrop Pharms., Inc.*, 347 Ark. 89, 98–99, 60 S.W.3d 428, 433–34 (2001) (denying class certification in a case in which the issue was whether a contract was formed between the company and its sales force, even though the existence of a contract is determined objectively); *Childs v. Adams*, 322 Ark. 424, 432–33, 709 S.W.2d 641, 645 (1995) (the objective manifestation of assent may be proven by circumstantial evidence); *ERC Mortgage Group v. Luper*, 32, Ark. App. 19, 23, 795 S.W.2d 362, 364 (1990) (“the standard is an objective one”).

In *Aon Risk Services, Inc. v. Meadors*, 100 Ark. App. 272, 281–82, 267 S.W.3d 603, 610 (2007), the court distinguished ambiguous offers, which may form a contract, and indefinite offers, which cannot form a contract. An indefinite offer/agreement is “incomprehensively vague or incapable of being understood.” An ambiguous offer/agreement “may be understood and enforced by applying the rules of contract construction.” *Id.*

In *City of Dardanelle v. City of Russellville*, 372 Ark. 486, 490–91, 277 S.W.3d 562, 565–66 (2008), a joint resolution between two municipalities stated that the parties agreed to cooperate in the pursuit of funding for a sewer outfall line. In a suit for breach of the agreement, the court held as a matter of law that the terms of the joint resolution were too uncertain to establish an obligation of either party and did not constitute a legally binding agreement.

Research References

West's Key Number Digest
Contracts ◊353(2)

Legal Encyclopedias
C.J.S., Contracts §§ 1006, 1058 to 1061

AMI 2403

NO DISPUTE AS TO EXISTENCE OF CONTRACT

The parties do not dispute that _____ [name of one contracting party]
and _____ [name of other contracting party] entered into a contract.

NOTE ON USE

Use this instruction when the parties do not dispute the existence of the contract underlying the cause of action. The instruction is formatted to be used in any case, including the case where the plaintiff is a third-party beneficiary of the contract.

If this instruction is used, do not use AMI 2402, 2404, 2405, 2406, 2407, 2408, or 2409.

Research References

West's Key Number Digest
Contracts ✎353(2)

Legal Encyclopedias
C.J.S., Contracts §§ 1006, 1058 to 1061

AMI 2404

CONTRACT EXPRESS OR IMPLIED

A contract may be express or implied. [An express contract may be oral or written.] [An implied contract is created by the conduct of the parties or their course of dealing. In determining whether an implied contract was formed between the plaintiff and the defendant, you should consider the parties' conduct and course of dealing from the viewpoint of a reasonable person, considering all of the surrounding circumstances.]

NOTE ON USE

Use this instruction if there is an issue as to whether the parties had a valid contract because all or part of the contract is either oral or implied. Use the appropriate bracketed sentences.

When this instruction is used, it should immediately follow AMI 2401. Immediately after this instruction, AMI 2402 should be given.

COMMENT

A contract implied in fact "derives from the 'presumed' intention of the parties as indicated by their conduct" where the agreement has not been expressed in words. Such a contract "is proven by circumstances showing the parties intended to contract by circumstances showing the general course of dealing between the parties." *K.C. Props. of N.W. Arkansas, Inc. v. Lowell Investment Partners, LLC*, 373 Ark. 14, 29, 280 S.W.3d 1, 14 (2008); *Steed v. Busby*, 268 Ark. 1, 7, 593 S.W.2d 34, 38 (1980). The elements of a contract implied in fact are identical to those of an express contract. *Id.* See also *Phillips v. Marist Soc. of Washington Province*, 80 F.3d 274, 277 (8th Cir. 1996) (the conduct or course of dealing is evaluated from the viewpoint of a reasonable person considering all surrounding circumstances).

Contracts implied in fact are distinct from contracts implied by law. Contracts implied by law, sometimes called quasi-contracts, are not based on implied promises to pay or perform but are obligations created by law to afford justice. *Downtowner Corp. v. Commonwealth Securities Corp.*, 243 Ark. 122, 126, 419 S.W.2d 126, 128 (1967) (distinguishing the two concepts).

In general, the law does not imply a contract when the parties have

made a specific one on the same subject matter. *Glenn Mechanical, Inc. v. South Ark. Regional Health Center, Inc.*, 101 Ark. App. 440, 445, 278 S.W. 3d 583, 587 (2008) (a written subcontract covered the dispute). However, this general rule is subject to several exceptions, including the rescission at law of the contract, the discharge of the contract by impossibility or frustration of purpose, mutual mistake of material fact, a disputed performance compelled under protest, and the existence of a contract that fails to address, or fully address, a subject so that the contract is too indefinite on the subject to be enforceable. *See QHG of Springdale, Inc. v. Archer*, 2009 Ark. App. 692, at 9–13 (holding that a written contract did not preclude an implied claim for unjust enrichment because the written contract between a physician and hospital required “some call rotation” but did “not fully address rotating call” and provided “no yardstick for measuring damages” where the physician was required to provide almost non-stop call coverage); *Friends of Children v. Marcus*, 46 Ark. App. 57, 876 S.W.2d 603 (1994) (a written placement agreement for the adoption of a child did not preclude an implied claim for restitution of the adoption fee following the agreed dissolution of the interlocutory decree of adoption and return of the child to the adoption agency).

Research References

West's Key Number Digest

Contracts ◊353(1); Implied and Constructive Contracts ◊122

Legal Encyclopedias

C.J.S., Contracts §§ 1058 to 1061, 1006, 1014

AMI 2405

DEFINITION—OFFER AND ACCEPTANCE

When I use the word “offer,” I mean a proposal to enter into a contract that invites acceptance by the party to whom it is directed. An offer must be communicated by words or conduct to the other party.

A party “accepts” an offer when *[he][she][it]* demonstrates *[his][her][its]* unconditional agreement to the material terms of the offer. “Acceptance” may reasonably be implied from words or conduct, and it must occur before the offer is withdrawn or lapses. *[If the offer requires acceptance in a specific form, then the offer may only be accepted in that form.]*

[Silence and inaction do not ordinarily constitute acceptance. (However, a party who knowingly accepts the benefits of a proposed contract for services with the reasonable opportunity to reject them and reason to know the services were offered with the expectation of compensation is bound by its terms.))]

NOTE ON USE

Use this instruction when AMI 2402 is given.

Use the bracketed sentence in the second paragraph if the offer prescribes specific means of acceptance.

Insert the third paragraph when warranted by the evidence. If the third paragraph is inserted, use the sentence in parentheses if one party alleges that the other party knowingly accepted the benefits of a proposed contract for services. If a case contains another situation recognized by law in which silence and inaction constitute acceptance, an appropriate sentence should be substituted for the sentence in parentheses.

COMMENT

“An offer is the manifestation of willingness to enter into a bargain,

so made as to justify another person in understanding that his assent to the bargain is invited and will conclude it." *Aon Risk Services, Inc. v. Meadors*, 100 Ark. App. 272, 281, 267 S.W.3d 603, 609 (2007). *See also* *ERC Mortg. Group, Inc. v. Luper*, 32 Ark. App. 19, 795 S.W.2d 362 (1990) (quoting the same definition of offer from the RESTATEMENT (SECOND) OF CONTRACTS), *overruled in part on other grounds*, *Mosley Machinery Co. v. Gray Supply Co.*, 310 Ark. 448, 837 S.W.2d 462 (1992). The definition used in this instruction is conceptually identical to the RESTATEMENT definition.

The definition of "acceptance" in this instruction is in accord with the Arkansas cases which require acceptance of the *material* terms of the offer. *See Aon Risk Services*, 100 Ark. App. at 283, 267 S.W.3d at 611 ("an acceptance must unconditionally agree to all the material provisions of the offer"); *MDH Builders, Inc. v. Nabholz Constr. Corp.*, 70 Ark. App. 284, 289, 17 S.W.3d 97, 100-01 (2000) (same); *ERC Mortgage*, 32 Ark. App. at 23, 795 S.W.2d at 364 (quoting from RESTATEMENT (SECOND) OF CONTRACTS that the "acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer"). An acceptance does not become a counteroffer merely by reciting terms that were implied in the original offer. *See Byford v. Gates Bros. Lumber*, 216 Ark. 400, 402-03, 225 S.W.2d 929, 930-31 (1950) (where offer required performance within a reasonable time, the "suggestion" in acceptance of ninety days for performance was not such a substantial change as to qualify the offer). But to be effective, an acceptance must be identical with the material terms of the offer. *MDH Builders, supra*. For additional discussion of the "mirror image" rule with respect to acceptances of offers, *see* the Comment to AMI 2409.

Acceptance of a contract may be accomplished by spoken words or conduct. *See Childs v. Adams*, 322 Ark. 424, 433, 909 S.W.2d 641, 645 (1995) (late acceptance of written offer, forming a counter-offer, which was accepted by the conduct of the party who made the original offer). Silence generally does not constitute an acceptance of an offer although silence may constitute acceptance in certain special circumstances. The RESTATEMENT (SECOND) OF CONTRACTS recognizes only three situations in which silence may constitute acceptance of a contract: (i) where the offeree takes the benefit of offered services with the reasonable opportunity to reject them and with reason to know they were offered with the expectation of compensation; (ii) where the offeror gives the offeree reason to understand that assent may be manifested by silence, and the offeree intends to accept by his silence; and (iii) where because of previous dealings it is reasonable that the offeree should notify the offeror if he does not intend to accept. RESTATEMENT (SECOND) OF CONTRACTS § 69 (1981).

Research References

West's Key Number Digest
Contracts ⇨353(2)

Legal Encyclopedias
C.J.S., Contracts §§ 1007, 1058 to 1061

AMI 2406

DEFINITION—CONSIDERATION

When I use the term “consideration,” I mean something of value that must be bargained for and given in exchange for a promise.

“Something of value” may consist of a promise—such as a promise to pay money or to perform a service or to deliver goods; an act—such as the payment of money, the delivery of goods or the performance of services; or a forbearance—such as giving up the right to sue, the right to compete, or the right to perform a certain act.

[An act already completed cannot be consideration for a later contract.]

[A promise by a person to do something *[he][s-he][it]* already has an obligation to do cannot be consideration for a contract, except where the existence of the duty is the subject of a reasonable dispute.]

NOTE ON USE

Insert the bracketed paragraphs when warranted by the evidence. The second paragraph is designed to be used in nearly every case. However, if there is another specific example of a promise, an act, or a forbearance that should be either added to or substituted for one of the enumerated examples in a particular case, the instruction should be modified.

COMMENT

Consideration is often a difficult concept for a jury to understand. The instruction is in accord with the definition most often cited in Arkansas case law. See *Bass v. Service Supply Co., Inc.*, 25 Ark. App. 273, 757 S.W.2d 189 (1988); *McIlroy Bank & Trust Co. v. Comstock*, 13 Ark. App. 13, 678 S.W.2d 782 (1984).

This instruction does not address the rare case in which the

consideration passes to or from a third party. *See* John Deere Co. v. Broomfield, 803 F.2d 408 (8th Cir. 1986) (applying Arkansas law).

There must be additional consideration when the parties to a contract enter into an additional agreement. *Youree v. Eshaghoff*, 99 Ark. App. 4, 256 S.W.3d 551 (2007). Multiple agreements entered into as part of a related set of contracts, however, may not require separate consideration for each agreement. *Trakru v. Matthews*, 2014 Ark. App. 154 (holding that asset purchase agreement and non-compete agreement could serve as the consideration for an option contract entered into eight days earlier because promises were made as part of a related set of contracts). If, without legal justification, a party to a contract breaks it or threatens to break it and, in order to induce performance, the other party promises to give more than was originally agreed upon, there is no consideration for the new promise because when the party who threatens to break the contract finally performs, he does no more than he was bound in law to do under the original contract. *Youree*, 99 Ark. App. at 9, 256 S.W.3d at 555.

Research References

West's Key Number Digest
Contracts ◊353(4)

Legal Encyclopedias
C.J.S., Contracts § 1062

AMI 2407

DEFINITION—REASONABLY CERTAIN

When I say the contract's essential terms must be "reasonably certain," I mean that the terms must provide a basis for determining the existence of a breach and for giving an appropriate remedy.

[If the terms of the contract are uncertain, the contract may still be valid if the actions of the parties provide meaning to the uncertain terms.]

NOTE ON USE

Insert the bracketed paragraph when warranted by the evidence.

COMMENT

The definition of "reasonably certain" in this instruction is taken from *Ciba-Geigy Corp. v. Alter*, 309 Ark. 426, 834 S.W.2d 136 (1992) and from *RESTATEMENT (SECOND) OF CONTRACTS* § 33(2) (1981).

An offer which is too indefinite to form a contract is one which is incomprehensibly vague or incapable of being understood. An ambiguity in an offer does not prevent the formation of a contract but may require interpretation under the rules of contract construction. *Aon Risk Services, Inc. v. Meadors*, 100 Ark. App. 272, 282, 267 S.W.3d 603, 610 (2007).

With regard to the bracketed paragraph, indefiniteness in a contract may be "healed" by the conduct of both parties in carrying out the contract that furnishes "an index as to its meaning, which the language thereof fails to do." *Swafford v. Sealtest Foods Division of Nat. Dairy Products Corp.*, 252 Ark. 1182, 483 S.W.2d 202 (1972) (quoting *Beasley v. Boren*, 210 Ark. 608, 197 S.W.2d 287 (1946)).

Research References

West's Key Number Digest
Contracts ⇨353(6)

Legal Encyclopedias
C.J.S., Contracts §§ 1004, 1064, 1053, 1058

AMI 2408

DURATION OF OFFER

When an offer has been made, it can be accepted *[until withdrawn] [until rejected] [during the time specified in the offer] [during the time customary in the trade or business of the parties] [within a reasonable time, if no time is specified].*

[An offer to enter into a contract may be withdrawn at any time before it is accepted. In order to withdraw the offer, the party who made the offer must communicate that *[he][she][it]* is no longer willing to enter into the contract. To be effective, the communication of the withdrawal must be *(received by the party to whom the offer was made) (received by a person authorized to receive such communications) (deposited in some place that has been authorized for such communications to be deposited).*]

[If a party to whom an offer is made responds by proposing new, material terms or imposing material conditions not contained or implied in the original offer, that offer is rejected and may not thereafter be accepted.]

NOTE ON USE

Use this instruction when there is an issue to whether the offer could be accepted. Use the appropriate bracketed clause or clauses in the first paragraph.

If there is an issue as to whether the offer was withdrawn before acceptance, insert the first bracketed paragraph.

If there is an issue as to whether the offer was rejected, use the second bracketed paragraph.

COMMENT

The initial paragraph in this instruction is taken from *Kempner v.*

Cohn, 47 Ark. 519, 525-26, 1 S.W. 869, 871 (1886). The offeror may limit the time for the acceptance in the terms of the offer. If the offer contains no such limitation, the time for acceptance may be limited by any of the applicable bracketed circumstances. *Id.*

With regard to the first bracketed paragraph, an offeror's withdrawal of an offer does not become effective until actually received by the offeree or his agent or deposited at a place authorized by the offeror. RESTATEMENT (SECOND) OF CONTRACTS § 68 (1981). See *Kempner*, 47 Ark. at 526-27, 1 S.W. at 872 ("An uncommunicated revocation is in law no revocation at all."). However, the acceptance of an offer made by mail is complete upon deposit of the acceptance in the mail. *Id.*

With regard to the second bracketed paragraph, see the Comment to AMI 2409 for a discussion of the "mirror image" rule regarding acceptances of offers and an acceptance that proposes new, material terms.

Research References

West's Key Number Digest
Contracts — 353(2)

Legal Encyclopedias
C.J.S., Contracts §§ 1007, 1058 to 1061

AMI 2409

COUNTEROFFER

If a party to whom an offer is made responds to the offer by proposing additional material terms or conditions, the response may constitute a counteroffer, which may thereafter be accepted by the other party. In order for a response to constitute a counteroffer, it must meet the requirements of an "offer," as previously defined in these instructions.

NOTE ON USE

Use this instruction when it is alleged that a counteroffer was made by one party. Use this instruction with AMI 2405.

COMMENT

The principle of mutuality of obligation requires an offer to be accepted unconditionally and without new terms or conditions. Reservations or limitations in the acceptance effect a rejection of the offer and a counter-offer. *Tucker Duck & Rubber Co. v. Byram*, 206 Ark. 828, 830-31, 177 S.W.2d 759, 760 (1944) (the inclusion in an acceptance of offer to sell one grade of lumber of a request to purchase an additional, different grade of lumber constitutes a conditional acceptance).

Arkansas law has historically required the parties to mutually agree to "every essential term of the contract." *Id.* "It is the settled law of this State that, before an acceptance of an offer becomes a binding contract, the acceptance must be unconditional, and must accept the offer without modification or the imposition of new terms." *Smith v. School Dist. No. 89 of Crawford County*, 187 Ark. 405, 59 S.W.2d 1022 (1933) (quoting the Supreme Court of North Dakota). However, this "mirror image" rule has been "mitigated by the interpretation of offers, in accordance with common understanding, as inviting acceptance in any reasonable manner unless there is contrary indication." RESTATEMENT (SECOND) OF CONTRACTS § 58 cmt. a (1981). For example, an acceptance does not become a counteroffer merely by reciting terms that were implied in the original offer. *See Byford v. Gates Bros. Lumber*, 216 Ark. 400, 402-03, 225 S.W.2d 929, 930-31 (1950) (where offer required performance within a reasonable time, the "suggestion" in acceptance of ninety days for performance was not such a substantial change as to qualify the offer). And more recently, the Arkansas courts have stated that an acceptance must be identical with the *material* terms of the offer. *Aon Risk Services, Inc. v. Meadors*, 100 Ark. App. 272, 283, 267

S.W.3d 603, 611 (2007) (“an acceptance must unconditionally agree to all the material provisions of the offer”); MDH Builders, Inc. v. Nabholz Constr. Corp., 70 Ark. App. 284, 289, 17 S.W.3d 97, 101 (2000) (a response to an offer that introduces new, material terms or conditions is a counteroffer, not an acceptance). The Committee has consequently included the qualifying word “material” to describe the new terms and conditions that render a purported acceptance a counter-offer.

Research References

West's Key Number Digest
Contracts §353(2)

Legal Encyclopedias
C.J.S., Contracts §§ 1007, 1058 to 1061

AMI 2410

ISSUES—BREACH OF CONTRACT—THIRD PARTY
BENEFICIARY STATUS—ISSUE OF FACT

_____ claims damages from _____ for breach of
[Plaintiff] [defendant]
contract as a third party beneficiary of a contract be-
tween _____ and _____ and has the
[name of contracting party] [defendant]
burden of proving each of five essential propositions:

First, that _____ and _____ entered
[name of contracting party] [defendant]
into a contract;

Second, that _____ and _____ clearly
[name of contracting party] [defendant]
intended to benefit _____ under the contract;
[plaintiff]

Third, that the contract required _____ to
[defendant]
perform or not to perform a certain act;

Fourth, that _____ did what the contract
[name of contracting party]
required of [him][her][it]; and

Fifth, that _____ did not do what the contract
[defendant]
required of [him][her][it].

[If you find that _____ has proved each of these
[plaintiff]
propositions, then your verdict should be for _____.
[plaintiff]
If, however, _____ has failed to prove any one or more
[plaintiff]
of these propositions, then your verdict should be for _____.]
[defendant]

NOTE ON USE

Use this instruction instead of AMI 2401 when the plaintiff's contract claim is based upon his status as a third party beneficiary and the court has determined that the issue whether he is a third party beneficiary should be submitted to the jury. If the court has determined as a matter of law that the first two elements have been established, or if there is no dispute as to one or more of those elements, use AMI 2411.

The bracketed part of the instruction should not be given when the case is submitted on interrogatories.

COMMENT

Whether a person is a third party beneficiary to a contract is often a question of law for the court. *Kremer v. Blissard Management & Realty, Inc.*, 289 Ark. 419, 711 S.W.2d 813 (1986). *See also* *Little Rock Wastewater Utility v. Larry Moyer Trucking, Inc.*, 321 Ark. 303, 902 S.W.2d 760 (1995); *Howell v. Worth James Const. Co.*, 259 Ark. 627, 535 S.W.2d 826 (1976). However, when the contract is ambiguous, and the meaning of the ambiguous language depends upon disputed extrinsic evidence, there may be an issue of fact for the jury as to whether a person is a third party beneficiary.

See generally *Perry v. Baptist Health*, 358 Ark. 238, 189 S.W.3d 54 (2004).

Research References

West's Key Number Digest
Contracts §353(3)

Legal Encyclopedias
C.J.S., Contracts §§ 1022, 1058 to 1060

AMI 2411

ISSUES—BREACH OF CONTRACT—THIRD PARTY BENEFICIARY STATUS—NOT AN ISSUE OF FACT

_____ claims damages from _____ for breach of
[Plaintiff] [defendant]
contract as a third party beneficiary of a contract be-
tween _____ and _____. The court has al-
ready determined that [there was a contract between
[name of contracting party] [defendant]
_____ and _____ and that] _____ is a third
[name of contracting party] [defendant] [plaintiff]
party beneficiary of the contract. _____ has the
[Plaintiff]
burden of proving each of [three] [four] essential
propositions:

**[First, that _____ and _____ entered
[name of contracting party] [defendant]
into a contract;]**

[Second] [First], that the contract required
to perform or not to perform a certain act; [defendant]

**[Thlrd,] [Second], that _____ did what
the contract required of [him][her][it]; and**

[Fourth] [Third], that _____ did not do what the
contract required of [him][her][it].

[If you find that _____ has proved each of these propositions, then your verdict should be for _____. If, however, _____ has failed to prove any one or more of these propositions, then your verdict should be for _____.]

NOTE ON USE

Use this instruction when the court has determined as a matter of law that the plaintiff is a third party beneficiary of the contract at issue. If the court has also determined that there is a contract, or if the parties do not dispute that there is a contract, omit the first bracketed essential element, and use the appropriate bracketed provisions in the opening paragraph.

Research References

West's Key Number Digest
Contracts ⚡353(8)

Legal Encyclopedias
C.J.S., Contracts §§ 1022, 1058 to 1060

CONTRACT INTERPRETATION

AMI 2412

CONTRACT INTERPRETATION—GENERAL RULE—
AMBIGUITY IN LANGUAGE

The parties dispute the meaning of the following language in their contract:

[Insert ambiguous language]

It is your duty to interpret the contract to give effect to what the parties intended when they made their agreement. In determining the meaning of the language, you must take into consideration the language of the contract, the circumstances surrounding the making of the contract, the subject of the contract, the purpose of the contract, the situation and relation of the parties at the time the contract was made, the parties' subsequent course of performance, [the parties' prior course of dealing,] [(and) custom in the trade].

NOTE ON USE

This instruction should be given only if the court has determined that the contract contains ambiguous language and that the meaning of the ambiguous language depends upon disputed extrinsic evidence.

Insert the bracketed language when warranted by the evidence. Insert the "and" at the appropriate point in the final clause.

If the ambiguity involves a single word or short phrase, the first sentence may be modified to state, "The parties dispute the meaning of the term '_____' in their contract."

COMMENT

The submission of this instruction was approved in *Bull Motor Co. v. Murphy*, 101 Ark. App. 33, 42, 270 S.W.3d 350, 357 (2007) (dispute involving a contract for sale of a "new" vehicle where the vehicle sold

had been previously stolen from the dealer's lot and recovered by police after being driven forty miles).

A jury should not be called upon to interpret a contract unless it contains an ambiguity. A provision in a contract is ambiguous when it is susceptible to two or more reasonable interpretations. *Phelps v. U.S. Life Credit Life Ins. Co.*, 336 Ark. 257, 261–62, 984 S.W.2d 425, 427–28 (1999). If a provision of a contract is unambiguous, its construction is an issue of law for the trial court. However, if an ambiguity exists in the contract, the meaning of the ambiguous provision becomes an issue for the fact-finder. “The initial determination of the existence of an ambiguity in a contract rests with the trial court, and if an ambiguity exists, the meaning becomes a question of fact for the fact finder.” *Keller v. Safeco Ins. Co. of Am.*, 317 Ark. 308, 312, 877 S.W.2d 90, 93 (1994) (citing *Minerva Enters., Inc. v. Bituminous Cas. Corp.*, 312 Ark. 128, 851 S.W.2d 403 (1993)). See also *Kanning v. Allstate Ins. Cos.*, 67 Ark. App. 135, 138–39, 992 S.W.2d 831, 833 (1999); *Fryer v. Boyett*, 64 Ark. App. 7, 11, 978 S.W.2d 304, 306 (1998). “[W]hether the language of the policy is ambiguous is a question of law to be resolved by the court.” *W. World Ins. Co. v. Branch*, 332 Ark. 427, 430, 965 S.W.2d 760, 761 (1998). Thus, this and the following contract interpretation instructions, with the exception of AMI 2423, should be given only when the court has made the initial determination of the existence of an ambiguity.

The first sentence of the second paragraph is based upon the widely recognized “first rule” of contract interpretation that the finder of fact must give the language employed the meaning that the parties intended. See *First Nat'l Bank of Crossett v. Griffin*, 310 Ark. 164, 169, 832 S.W.2d 816, 819 (1992) (dispute involved guaranty agreement); *Sutton v. Sutton*, 28 Ark. App. 165, 167, 771 S.W.2d 791, 792 (1989) (dispute involved property settlement agreement in a divorce to which the court applied general rules of construction).

The factors in the second sentence of the second paragraph that the jury should take into consideration in determining the meaning of the ambiguous term(s) come from several cases. See *Dugal Logging, Inc. v. Ark. Pulpwood Co.*, 66 Ark. App. 22, 30, 988 S.W.2d 25, 30 (1999) (whether a contract for sale of timber terminated on a date certain); *Sutton*, 28 Ark. App. at 167, 771 S.W.2d at 792; *First Nat'l Bank of Crossett*, 310 Ark. at 168, 832 S.W.2d at 819; *Schnitt v. McKellar*, 244 Ark. 377, 385–86, 427 S.W.2d 202, 207–08 (1968) (whether an instrument was a deed of conveyance of mineral interests or a contract).

An ambiguity is present where there is uncertainty of meaning in a written instrument and the language is fairly susceptible to more than one equally reasonable interpretation. *Alexander v. McEwen*, 367 Ark. 241, 246, 239 S.W.3d 519, 523 (2006) (beneficiary designation in IRA account); *Magic Touch Corp. v. Hicks*, 99 Ark. App. 334, 339, 260 S.W.3d 322, 326 (2007) (employee handbook).

In *Smith v. Prudential Prop. and Cas. Ins. Co.*, the Arkansas

Supreme Court made it clear that even when a contract is ambiguous, if the meaning of the ambiguity does not depend on disputed extrinsic evidence, the construction and legal effect of the contract remain questions of law. 340 Ark. 335, 341, 10 S.W.3d 846, 850 (2000).

This instruction should not be given in cases involving the interpretation of ambiguous provisions of insurance contracts in which the insured had no opportunity to negotiate or change the terms of the contract, and the meaning of the ambiguity does not depend on disputed extrinsic evidence. In such cases, all ambiguities will be resolved in favor of the insured as a matter of law. See *Smith*, 340 Ark. at 340, 10 S.W.3d at 850. See also *Phelps*, 336 Ark. at 261–262, 984 S.W.2d at 428; *Unigard Sec. Ins. Co. v. Murphy Oil USA, Inc.*, 331 Ark. 211, 221, 962 S.W.2d 735, 740 (1998); *Noland v. Farmers Ins. Co.*, 319 Ark. 449, 452, 892 S.W.2d 271, 272 (1995).

Where ambiguity does depend on disputed extrinsic evidence, this instruction may be appropriate even pertaining to a contract of insurance. See *Williams v. First Unum Life Ins. Co.*, 358 Ark. 224, 229–30, 188 S.W.3d 908, 911–12 (2004).

In *Farm Bureau Mut. Ins. Co. of Ark., Inc. v. Sells*, 2010 Ark. App. 728, at 3–4, the court stated:

Ordinarily, the question of whether the language of an insurance policy is ambiguous is one of law to be resolved by the court. *McGrew v. Farm Bureau Mut. Ins. Co. of Arkansas, Inc.*, 371 Ark. 567, 268 S.W.3d 890 (2007). Where, however, parol evidence has been admitted to explain the meaning of the language, the determination becomes one of fact for a factfinder to determine. *Id.* Where there is a dispute as to the meaning of an insurance contract term or provision, the circuit court must act as a gatekeeper, determining first whether the dispute may be resolved by looking solely to the contract or whether the parties rely on disputed extrinsic evidence to support their proposed interpretation. *Id.* Thus, where the issue of ambiguity may be resolved by reviewing the language of the contract itself, it is the circuit court's duty to make such determination as a matter of law. *Id.* However, when the parties go beyond the contract and submit disputed extrinsic evidence to support their proffered definitions of the term, this is a question of fact for the factfinder. *Id.*

Research References

West's Key Number Digest
Contracts ◊353(3)

Legal Encyclopedias
C.J.S., Contracts §§ 1004, 1052 to 1055, 1064

AMI 2413

**CONTRACT INTERPRETATION—ORDINARY
MEANING**

You should give the words of a contract their plain, ordinary, and usual meaning, unless it is clear that certain words were intended to be used in a technical sense.

COMMENT

Ordinarily, it is the duty of the court in the trial of cases to construe a written contract and declare its terms and meaning to the jury. *Wilkes v. Stacy*, 113 Ark. 556, 169 S.W. 796, 798 (1914). A contract relating to the ordinary transactions of life is to be construed according to its plain, ordinary, and popular meaning. *Id.* at 797.

It is the duty of the court to construe unambiguous terms in an agreement according to the plain meaning of the language employed. *Skokos v. Skokos*, 332 Ark. 520, 528, 968 S.W.2d 26, 30 (1998).

In construing any contract, the court must consider the sense and meaning of words used by the parties as they are taken and understood in their plain, ordinary meaning. *Crittenden County v. Davis*, 2013 Ark. App. 655, 6 (citing *First Nat. Bank of Crossett v. Griffin*, 310 Ark. 164, 169, 832 S.W.2d 816, 819 (1992)). The best construction is that which is made by viewing the subject of the contract as the mass of mankind would view it, as it may be safely assumed that such was the aspect in which the parties themselves viewed it. *Crittenden County* at 6.

Research References

West's Key Number Digest
Contracts ⇨353(6)

Legal Encyclopedias
C.J.S., Contracts §§ 1004, 1048 to 1057, 1064

AMI 2414

**CONTRACT INTERPRETATION—WORDS OR
PHRASES OF A PARTICULAR TRADE OR
OCCUPATION**

You should interpret words or phrases associated with a particular trade or occupation as experienced and knowledgeable members of that trade or occupation use them, unless the evidence discloses that the parties used them in a different sense.

COMMENT

In spite of the fact that words in a contract are generally to be given their usual and ordinary meaning, words of art or words connected with or peculiar to a particular trade, profession, or occupation are to be given the signification attached to them by experts in such art or trade, profession, or occupation unless it appears that the words were used in a different sense. *Les-Bil, Inc. v. General Waterworks Corp.*, 256 Ark. 905, 910, 511 S.W.2d 166, 169-70 (1974).

If in reference to the subject matter of the contract particular words and expressions have by usage acquired a meaning different from the plain, ordinary, and popular meanings the parties using those words in such a contract must be taken to have used the words in their peculiar senses. *Wilkes v. Stacy*, 113 Ark. 556, 169 S.W. 796, 797 (1914). Words that are facially technical or ambiguous, foreign or peculiar to the sciences or the arts, or to particular trades, professions, or occupations may be explained where they are employed in written instruments by parol evidence of usage. *Id.*

Research References

West's Key Number Digest
Contracts ⇨353(6)

Legal Encyclopedias
C.J.S., Contracts § 1064

AMI 2415

**CONTRACT INTERPRETATION—COURSE OF
PERFORMANCE**

You should give weight to the meaning placed on the language by the parties themselves, as shown by their statements, acts, or conduct after the contract was made.

NOTE ON USE

This instruction should be given only if the court has determined that the contract contains ambiguous language and that the meaning of the ambiguous language depends upon disputed extrinsic evidence.

If the contract is governed by Article 2 of the Uniform Commercial Code, use AMI 2511.

COMMENT

An uncertain agreement may be supplemented by subsequent acts, agreements, or declarations of the parties as to make it certain and valid. *Foundation Telecommunications, Inc. v. Moe Studio, Inc.*, 341 Ark. 231, 242, 16 S.W.3d 531, 538 (2000) (holding that the parties had entered into a binding contract). The objection of indefiniteness may be obviated by performance and acceptance of performance. *Id.*

Where a contract is ambiguous, the court will accord considerable weight to the construction the parties themselves give to it, evidenced by subsequent statements, acts, and conduct. *RAD-Razorback Ltd. Partnership v. B.G. Coney Co.*, 289 Ark. 550, 555, 713 S.W.2d 462, 466 (1986). *See Welch v. Cooper*, 11 Ark. App. 263, 268, 670 S.W.2d 454, 458 (advising that the court looks to the conduct of the parties to determine what they intended when a term is indefinite).

Intention of the parties must be ascertained from the whole context of an agreement or deed and not from particular words and phrases. *Wynn v. Sklar & Phillips Oil Co.*, 354 Ark. 332, 341, 493 S.W.2d 439, 444 (1973). Courts may also acquaint themselves with and consider circumstances existing at the time of the execution of a contract and the situation of the parties who made it. *Id. See Northwest Nat. Bank v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 25 Ark. App. 279, 283, 757 S.W.2d 182, 184 (1988) (noting that assignments are generally interpreted or construed under the rules governing construction of contracts, with primary object always being to ascertain and carry out the intention of the parties).

Research References

West's Key Number Digest
Contracts §353(6)

Legal Encyclopedias
C.J.S., Contracts § 1064

AMI 2416

CONTRACT INTERPRETATION—COURSE OF DEALING

The parties' intent may be shown by their prior course of dealing. A "course of dealing" is conduct between the parties before the making of their contract that can be fairly regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

NOTE ON USE

This instruction should be given only if the court has determined that the contract contains ambiguous language and that the meaning of the ambiguous language depends upon disputed extrinsic evidence.

If the contract is governed by Article 2 of the Uniform Commercial Code, use AMI 2511.

COMMENT

This instruction is based on the RESTATEMENT (SECOND) OF CONTRACTS § 223 (1981).

Research References

West's Key Number Digest
Contracts ⚙353(6)

Legal Encyclopedias
C.J.S., Contracts § 1064

AMI 2417

**CONTRACT INTERPRETATION—CUSTOM IN THE
TRADE**

The parties' intent may be shown by custom in the trade. A "custom in the trade" is any practice or method of dealing that is uniform, reasonable, and so well established in the trade as to justify an expectation that it will be observed with respect to the contract in question.

NOTE ON USE

This instruction should be given only if the court has determined that the contract contains ambiguous language and that the meaning of the ambiguous language depends upon disputed extrinsic evidence.

If the contract is governed by Article 2 of the Uniform Commercial Code, use AMI 2511.

COMMENT

This instruction is based on the RESTATEMENT (SECOND) OF CONTRACTS § 222 (1981).

In *Westark Surgical Clinic, P.A. v. Weisse*, 279 Ark. 227, 229, 650 S.W.2d 571, 572 (1983), the supreme court stated, "a custom is admissible as evidence only if it is known to both parties, or is such a widespread custom in a trade that the parties will be presumed to be aware of the custom."

In *Venturi, Inc. v. Adkisson*, 261 Ark. 855, 857, 552 S.W.2d 643, 645 (1977), the supreme court stated that evidence of custom and usage is not admissible to vary, contradict, or defeat the terms of a contract. However, if custom and usage is uniform, reasonable, and well established, it may govern the terms of a contract and may be considered part of the contract unless contradictory to the express terms of the contract.

Research References

West's Key Number Digest
Contracts Ⓒ353(6)

Legal Encyclopedias
C.J.S., Contracts § 1064

AMI 2418

**CONTRACT INTERPRETATION—CONSTRUCTION
OF EXPRESS TERMS, COURSE OF DEALING, AND
CUSTOM IN THE TRADE**

The express language of a contract and any applicable [*course of performance*], [*course of dealing*], or [*custom in the trade*], as previously defined for you, should be interpreted to be consistent with each other if such an interpretation is reasonable. If such an interpretation is not reasonable, the express terms of a contract should be given greater weight than [*course of performance*], [*course of dealing*], and [*custom in the trade.*] [*Course of performance should be given greater weight than (course of dealing) (or) (custom in the trade).*] [*Course of dealing should be given greater weight than custom in the trade.*]

NOTE ON USE

If the contract is governed by Article 2 of the Uniform Commercial Code, use AMI 2511.

COMMENT

This instruction is based on the RESTATEMENT (SECOND) OF CONTRACTS § 203 (1981). Where there was no dispute as to the existence of an oral contract, evidence of uniform, reasonable, and well-established custom and usage is admissible to determine disputed terms of the parties' agreement. *Venturi, Inc. v. Adkisson*, 261 Ark. 855, 552 S.W.2d 643 (1977).

In *Turley v. Staley*, 2009 Ark. App. 840, the court held in a case involving a land sale contract containing a non-waiver clause that the sellers/creditors' acceptance of late payments over eleven years waived their right to strictly enforce the terms of the agreement absent specific notice to the buyer of their intent to do so, where strict enforcement would have worked a forfeiture of the buyer's equity in the property.

Research References

West's Key Number Digest
Contracts ⇨353(6)

Legal Encyclopedias
C.J.S., Contracts §§ 1004, 1048 to 1057, 1064

AMI 2419

**CONTRACT INTERPRETATION—LANGUAGE OF
THE CONTRACT SHOULD BE INTERPRETED AS A
WHOLE**

A contract must be interpreted as a whole. The different clauses of the contract must be read together and interpreted, if possible, so that all of the parts are consistent with each other. An interpretation that fails to give effect to any provision of a contract cannot be adopted if the contract can be interpreted in a way that gives effect to all of its provisions.

NOTE ON USE

If the contract is contained in more than one document, AMI 2420 should be given instead of this instruction.

COMMENT

"In seeking to harmonize different clauses of a contract, we should not give effect to one to the exclusion of another even though they seem conflicting or contradictory, nor adopt an interpretation which neutralizes a provision if the various clauses can be reconciled. The object is to ascertain the intention of the parties, not from particular words or phrases, but from the entire context of the agreement." *RAD-Razorback Ltd. Partnership v. B.G. Coney Co.*, 289 Ark. 550, 554, 713 S.W.2d 462, 465 (1986). In that case, the court harmonized separate sections of a single contract to determine the intention of the parties. Similarly, in *Fryer v. Boyett*, 64 Ark. App. 7, 11, 978 S.W.2d 304, 306 (1998), the court found that even though two contracts were subject to differing constructions, the trial court's interpretation was affirmed based upon the rule of construction that "[d]ifferent clauses of a contract must be read together and the contract construed so that all of its parts harmonize, if that is at all possible."

In *Carter v. Cline*, 2011 Ark. 474, the court paraphrased this instruction in order to interpret a contract for the sale of a house that contained certain conditions, which were to occur before performance was required. In that case, the contract contained a condition that the buyer obtain financing and inform the seller within 10 days that financing had been approved. The buyer received a conditional commitment for financing and so informed the seller. However, that commitment was withdrawn by the lender prior to closing. In suing for breach, the seller argued that the condition had been met when the buyer provided

the commitment for financing. The court disagreed, finding that the requirement that the buyer actually obtain financing was the "controlling condition" and, because this condition had not been met, performance of the contract was not required.

Research References

West's Key Number Digest
Contracts §853(6)

Legal Encyclopedias
C.J.S., Contracts §§ 1004, 1048 to 1057, 1064

AMI 2420

**CONTRACT INTERPRETATION—CONTRACT
COMPOSED OF MORE THAN ONE DOCUMENT**

If the parties' contract is contained in more than one document, all of the documents must be considered together. The different clauses of the documents that make up the contract must be read together and, if possible, interpreted so that all of their parts are consistent with each other. An interpretation that fails to give effect to any provision of a contract cannot be adopted if the contract can be interpreted in a way that gives effect to all of its provisions.

NOTE ON USE

If the contract is contained in one document, AMI 2419 should be given instead of this instruction.

COMMENT

"In seeking to harmonize different clauses of a contract, we should not give effect to one to the exclusion of another even though they seem conflicting or contradictory, nor adopt an interpretation which neutralizes a provision if the various clauses can be reconciled. The object is to ascertain the intention of the parties, not from particular words or phrases, but from the entire context of the agreement." *RAD-Razorback Ltd. Partnership v. B.G. Coney Co.*, 289 Ark. 550, 554, 713 S.W.2d 462, 465 (1986). In that case, the court harmonized separate sections of a single contract to determine the intention of the parties. Similarly, in *Fryer v. Boyett*, 64 Ark. App. 7, 11, 978 S.W.2d 304, 306 (1998), the court found that even though two contracts were subject to differing constructions, the trial court's interpretation was affirmed based upon the rule of construction that "[d]ifferent clauses of a contract must be read together and the contract construed so that all of its parts harmonize, if that is at all possible."

"When two instruments are executed contemporaneously, by the same two parties in the course of the same transaction, they should be considered as one contract for purposes of interpretation, in the absence of a contrary intention." *Stokes v. Roberts*, 289 Ark. 319, 322–23; 711 S.W.2d 757, 759 (1986); *Universal Sec. Ins. Co. v. Ring*, 298 Ark. 582, 586–87; 769 S.W.2d 750, 752–53 (1989). In *Stokes*, the court applied this rule of construction after finding that two separate contracts were

intended as one and that the parties would not have agreed to one contract without the other.

A separate document that is incorporated by reference into the contract becomes a single agreement between the parties and must be construed together. In order to be incorporated by reference so that it becomes one contract, the reference must be clear and unequivocal and the terms of the incorporated document must be known or easily available to the contracting parties. *Ingersoll-Rand Co. v. El Dorado Chem. Co.*, 373 Ark. 226, 283 S.W.3rd 191 (2008).

Research References

West's Key Number Digest
Contracts ◊353(6)

Legal Encyclopedias
C.J.S., Contracts §§ 1004, 1048 to 1057, 1064

AMI 2421

**CONTRACT INTERPRETATION—SPECIFIC AND
GENERAL PROVISIONS**

If there is a contradiction between general provisions and more detailed, specific provisions in a contract, the specific provisions ordinarily qualify the meaning of the general provisions.

COMMENT

In *Pate v. Goyne*, 212 Ark. 51, 54, 204 S.W.2d 900 (1947), a case involving the interpretation of a real estate agency contract, the court stated the rule that “[w]here there is inconsistency between general and specific provisions, the specific provisions ordinarily qualify meaning of the general provisions” Likewise, in *Missouri Pac. R. Co. v. Winburn Tile Mfg. Co.*, 461 F.2d 984 (8th Cir. 1972), the Eighth Circuit applied the rule set out in *Pate* to enforce a specific indemnity provision in conflict with more general terms of an “Industrial Track Agreement.”; Restatement (Second) of Contracts § 203, cmt. e (1981).

Research References

West's Key Number Digest
Contracts §353(6)

Legal Encyclopedias

C.J.S., Contracts §§ 1004, 1048 to 1057, 1064

AMI 2422

**CONTRACT INTERPRETATION—WRITTEN OR
TYPEWRITTEN PROVISIONS CONTROL
PROVISIONS OF PREPRINTED FORMS**

If a contract contains handwritten or typewritten provisions that are contradictory to the provisions of a preprinted form, the handwritten or typewritten provisions control.

COMMENT

In *Leonard v. Merchants & Farmers Bank*, 290 Ark. 571, 720 S.W.2d 908 (1986) the court interpreted a promissory note that contained preprinted language stating that the interest rate was a fixed amount and typewritten language providing that the rate was adjustable. In affirming the trial court's finding that the typewritten provision controlled, the court applied the rule that "typewritten provisions prevail over printed ones, only when the two are so contradictory that one must yield to the other" In *Stacy v. Williams*, 38 Ark. App. 192, 834 S.W.2d 156 (1992) the court applied this rule of contract interpretation to find that a typewritten provision created an ambiguity in a contract such that the intent of the parties could not be discerned from the four corners of the document such that the trial court properly considered parol evidence to construe the parties' intent. See RESTATEMENT (SECOND) OF CONTRACTS § 203, cmt. f (1981).

Research References

West's Key Number Digest
Contracts ¶353(6)

Legal Encyclopedias
C.J.S., Contracts §§ 1004, 1048 to 1057, 1064

AMI 2423

**CONTRACT INTERPRETATION—TIME NOT
EXPRESSED—REASONABLE TIME**

When a contract is silent as to when it must be performed, the law requires that it must be performed within a reasonable time. In determining whether the contract was performed within a reasonable time, you should consider the nature of the contract, the situation of the parties, and the circumstances surrounding the performance.

NOTE ON USE

This instruction may be appropriate in cases in which there is no alleged ambiguity.

If the contract is governed by Article 2 of the Uniform Commercial Code, use AMI 2503 and/or AMI 2511.

COMMENT

This instruction is based on the RESTATEMENT (SECOND) OF CONTRACTS § 204, cmt. d (1981).

In the context of a contract for harvesting timber, the court in *Excelsior Mining Co. v. Willson*, 206 Ark. 1029, 1032, 178 S.W.2d 252 (1944) applied “the fundamental principle that where a time is not specified for the performance of a contract, it should be performed in a reasonable time” considering all the facts and circumstances surrounding the transaction. For cases in accord with this instruction, see *Laird v. Lacey*, 263 Ark. 570, 566 S.W.2d 145 (1978); *Pearce v. Hollis Const. Co.*, 212 Ark. 434, 206 S.W.2d 15 (1947); *Erschine Williams Lumber Co. v. Burgess*, 159 Ark. 431, 252 S.W. 353 (1923).

Research References

West's Key Number Digest
Contracts ⇨353(6)

Legal Encyclopedias
C.J.S., Contracts §§ 1004, 1048 to 1057, 1064

AMI 2424

**CONTRACT INTERPRETATION—CONSTRUCTION
AGAINST ONE WHO DRAFTED CONTRACT**

If you cannot determine the intention of the parties after considering the instructions that I have already given you concerning the interpretation of the ambiguous language in the contract, then you should interpret the ambiguous language against the party who prepared the contract.

NOTE ON USE

This instruction should not be used where disputed extrinsic evidence has been offered to establish the meaning of the ambiguous language.

This instruction should be used as the final instruction pertaining to contract interpretation and should reference the previous instructions in the set pertaining to contract interpretation.

It may be inappropriate to give this instruction where both parties negotiated the written language of the contract.

COMMENT

The rule that ambiguous language should be construed against the drafter is subordinate to the rule that the fact finder should never adopt a construction that neutralizes a contract provision when the contract can be construed to give effect to all of its provisions. It is also subordinate to the primary rule that the intention of the parties be ascertained and effectuated. *See Sturgis v. Skokos*, 335 Ark. 41, 977 S.W.2d 217 (1998) (affirming chancellor's implied rejection of rule that ambiguity should be construed against drafter when parties' course of performance conclusively demonstrated their intent); *Les-Bil, Inc. v. General Waterworks Corp.*, 256 Ark. 905, 511 S.W.2d 166 (1974) ("The dominant rule is that interpretation of a contract is controlled by the intention of the parties."); *Saltzman-Guenthner Clinic, Ltd. v. Burnett*, 5 Ark. App. 56, 632 S.W.2d 441 (1982) ("This rule must, however, give way in this cause to other rules of construction in our attempt to determine the parties' intent. . . ."). This instruction reflects these principles by requiring the jury to first attempt to ascertain the parties' intent through the dominant rules of construction before resorting to the subordinate rule and construing the ambiguous language against the drafter. Where

disputed extrinsic evidence has been offered to establish the meaning of the ambiguous language, this rule does not apply. *Tri-Eagle Enterprises v. Regions Bank*, 2010 Ark. App. 64.

Research References

West's Key Number Digest 353(6)
Contracts 353(6)

Legal Encyclopedias
C.J.S., Contracts §§ 1004, 1048 to 1057, 1064

PERFORMANCE OR BREACH

AMI 2425

MODIFICATION OF CONTRACT

[Plaintiff/Defendant] contends and has the burden of proving [by clear and convincing evidence] that the parties modified their [written] contract.

A contract may be modified by a later oral or written agreement that meets each of the elements of a contract.

["Clear and convincing evidence" is proof that enables you without hesitation to reach a firm conviction that the allegation is true.]

NOTE ON USE

This instruction should be followed by AMI 2402.

Do not use this instruction when the parties' contract provides that the contract may not be modified except in writing or if the contract is governed by Ark. Code Ann. § 4-2-209.

Use the bracketed words and phrases only when the contract alleged to have been modified was in writing.

COMMENT

"A modification of a contract, like the formation of its original terms, must meet all the elements of a contract . . ." In re Honeycutt, 198 B.R. 306, 311 (Bankr. E.D. Ark. 1996) (finding no modification where there was no proof that one of the parties assented to the modification); In accord with this instruction, see Leonard v. Downing, 246 Ark. 397, 438 S.W.2d 327 (1969) (finding that all the elements of a contract were present in an alleged modification of an executory contract).

The burden of proof for an oral modification of an oral contract is apparently undecided by Arkansas courts. However, those jurisdictions that have addressed the issue have held that the burden of proof is by a preponderance of the evidence. *See* 17B C.J.S., Contracts § 755, p. 483

(cases cited therein). The Committee has followed that authority in preparing this instruction but notes that subsequent decisions by Arkansas courts may require that this instruction be modified.

Arkansas law provides that clear and convincing evidence is required to prove the modification of a written contract by an oral agreement. *Columbia Mut. Cas. Ins. Co. v. Ingraham*, 47 Ark. App. 23, 883 S.W.2d 868 (1994), rev'd on other grounds, 320 Ark. 408, 896 S.W.2d 903 (1995); *Amerdyne Industries, Inc. v. POM, Inc.*, 760 F.2d 875 (8th Cir. 1985).

The definition of "clear and convincing evidence" in this instruction is a combination of two different formulations that have been recited by the Arkansas Supreme Court. In a number of cases and a variety of contexts, the court has stated the definition as: "proof that produces a firm conviction in you that the allegation is true." E.g., *Carter v. Four Seasons Funding Corp.*, 351 Ark. 637, 653, 97 S.W.3d 387, 395 (2003) (usury claim); *Ward v. Williams*, 354 Ark. 168, 118 S.W.3d 513, 521 (2003) (oral contract for sale of land); *Howell v. Scroll Technologies*, 343 Ark. 297, 304, 35 S.W.3d 800, 805 (2001) (workers' compensation); *Baker v. Arkansas Dept. of Human Services*, 340 Ark. 42, 48, 8 S.W.3d 499, 503 (2000) (termination of parental rights). However, the court appears to intend this definition to have the same meaning as other language it has recited ("proof so clear, direct, weighty, and convincing as to enable you to come to a clear conviction of the matter asserted") and in fact has sometimes included both formulations in the same opinion. See, e.g., *Howell v. Scroll Technologies*, *supra*; *Kelly v. Kelly*, 264 Ark. 865, 870, 575 S.W.2d 672, 675–676 (1979). The Committee combined language from both into a hybrid definition that appears to capture the essence of the principle.

Research References

West's Key Number Digest
Contracts ◊353(7)

Legal Encyclopedias
C.J.S., Contracts §§ 1004, 1042 to 1043, 1064 to 1065

AMI 2426

IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

In addition to the express terms of a contract, the law implies a promise between the parties that they will act in good faith and deal fairly with one another in performing and enforcing their obligations under the contract. Stated another way, the law implies a promise between the parties that they will not do anything to prevent, hinder, or delay the performance of the contract. However, the implied promise does not obligate either party to take any action that is contrary to the express terms of the contract.

[You may consider the alleged *[acts]* *[hindrances]* *[and]* *[delays]* of *[defendant]* only as evidence of a breach of the *[operative term or obligation]* of the contract.]

[You may consider the alleged *[acts]* *[hindrances]* *[and]* *[delays]* of *[plaintiff]* only as evidence of a breach of the *[operative term or obligation]* of the contract.]

NOTE ON USE

Because there is no cause of action in tort or contract for breach of the implied covenant of good faith and fair dealing, this instruction should only be given where there is evidence that one party's (or both parties') conduct prevented, hindered, delayed or impeded the performance of the express obligations under the contract.

Use the first bracketed paragraph of the instruction when there is evidence that the defendant prevented, hindered, or delayed the performance of the contract.

Use the second bracketed paragraph of the instruction when there is evidence that plaintiff prevented, hindered, or delayed the performance of the contract.

Use both bracketed paragraphs if each party presents evidence that the other prevented, hindered, or delayed the performance of the contract.

The specific term of the contract that was allegedly breached may be inserted in the bracketed paragraph(s), or the general "breach of the contract" may be inserted in an appropriate case.

COMMENT

In *Cantrell-Waind & Associates, Inc. v. Guillaume Motorsports, Inc.*, 62 Ark. App. 66, 72, 968 S.W.2d 72, 75 (1998), the court cited the RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981) in holding that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."

In *Country Corner Food & Drug, Inc. v. First State Bank & Trust Co. of Conway, Arkansas*, 332 Ark. 645, 655, 966 S.W.2d 894, 899 (1998), the court recognized that every contract imposes an obligation to act in good faith. However, the court declined to recognize a new tort for failure to act in good faith. *Id.* at 655–656, 966 S.W.2d at 898–99. *See also* *Preston v. Stoops*, 373 Ark. 591, 595, 285 S.W.3d 606, 610 (2008) (refusing to recognize a cause of action in tort for breach of the implied covenant of good faith). In *Arkansas Research Medical Testing, LLC v. Osborne*, 2011 Ark. 158, at 7, the court held that Arkansas does not recognize any separate cause of action, "be it in tort or contract," for a breach of the covenant of good faith and fair dealing. Instead, "a breach of the implied covenant of good faith and fair dealing remains nothing more than evidence of a possible breach of a contract between parties." *Id.*

The implied covenant of good faith and fair dealing has been applied in Arkansas to excuse a condition precedent to a defendant's performance under a contract where the defendant prevented the fulfillment of the condition. *Cantrell-Waind Assocs., Inc. v. Guillaume Motorsports, Inc.*, 62 Ark. App. 66, 968 S.W.2d 72 (1998). In *Cantrell-Waind*, a real estate commission due the plaintiff agent from the sale of the defendant's property was conditioned on the closing of the property before August 1, 1996. The defendant allegedly attempted to entice the buyer to delay the closing until after August 1, 1996, and, upon the buyer's refusal, the defendant made himself unavailable to complete the closing until after August 1. *Id.* at 68, 968 S.W.2d at 73. Citing the Restatement (Second) of Contracts, the court reasoned that "the non-occurrence of a condition of a duty . . . 'may be excused by prevention or hindrance of its occurrence through a breach of the duty of good faith and fair dealing.'" *Id.* at 71–72, 968 S.W.2d at 75. If non-occurrence of a condition is excused, then "the condition need no longer occur in order for performance of the duty to become due." *Id.*, 968 S.W.2d at 75. The appellate court held that, as a result of the implied covenant of good faith and fair dealing, the defendant "was obligated to not deliberately avoid closing the transaction before August 1." *Id.* at 72, 968 S.W.2d at 75.

The implied covenant of good faith and fair dealing did not limit either party's contractual right to terminate an insurance agency agreement without cause on three months written notice in *Gunn v. Farmers Insurance Exchange*, 2010 Ark. 434. In *Gunn*, the agent alleged that the insurance company had violated the implied covenant by terminating the agreement in bad faith. The supreme court found no evidence of bad faith and affirmed the trial court's entry of summary judgment for the insurance company. *Id.* at 5–6. The supreme court held that the contract clearly allowed termination on three months written notice without cause, “and an implied covenant should not be used to limit an expressly bargained-for term.” *Id.* at 6 (citing *Yarborough v. DeVilbiss Air Power, Inc.*, 321 F.3d 728 (8th Cir. 2003)). In *Yarborough*, the Eighth Circuit Court of Appeals affirmed a summary judgment dismissing a claim under Arkansas law for breach of the implied covenant of good faith and fair dealing in connection with the performance of an earn-out provision in a contract for the sale of a business. 321 F.3d at 733. The buyer of the business was obligated to make earn-out payments based on sales to certain customers for a period of three years. However, the contract provided that the buyer had the right “in its sole discretion” to determine the terms and conditions of sales, including the decision “to make or not make sales.” The court reasoned that the purpose of an implied covenant is to effectuate the parties intentions and that an implied covenant should not foreclose the benefits of the bargain that was struck in the agreement. *Id.* at 732–33. The court held that “in no situation can the implied covenant of good faith and fair dealing limit the way in which a party exercises its discretion when the aggrieved party has specifically disavowed any limitations on that discretion, and the exercise of that discretion (and its consequences) are easily foreseeable.” *Id.* at 733.

Although Arkansas courts have provided minimal guidance on the issue, courts in other jurisdictions have expressly held that the implied covenant of good faith and fair dealing concerns only the performance of the contract, and it does not extend to issues of contract formation. *See, e.g., Hill v. Galaxy Telecom, L.P.*, 176 F. Supp. 2d 636, 642 (N.D. Miss. 2001); RESTATEMENT (SECOND) OF CONTRACTS § 205, cmt. c (1981) (noting that the good faith obligation “does not deal with good faith in the formation of a contract”).

Research References

West's Key Number Digest
Contracts ⇨353(8)

Legal Encyclopedias
C.J.S., Contracts §§ 1040, 1065

AMI 2427

BREACH

The parties dispute whether _____ did what
[defendant/plaintiff]
the contract required of [him][her][it]. A party's failure
to do what the contract required of [him][her][it] is a
"breach" of the contract.

[A "material breach" is a failure to perform an essential term or condition that substantially defeats the purpose of the contract for the other party. A material breach excuses the performance of the other party (and allows that party to sue for damages on the whole contract). A breach that is not material does not excuse the performance of the other party (but does allow the party to seek damages for the partial breach).]

[A breach occurs when a party repudiates the contract before performance is due. Repudiation may consist of a statement reasonably interpreted to mean that the party will not or cannot perform the contract. It may also consist of a voluntary affirmative act that renders the party unable to perform.]

NOTE ON USE

Use the first bracketed paragraph when there is an issue as to whether the breach was material. Use the parenthetical sentences in that paragraph when appropriate.

Use the second bracketed paragraph when there is an issue as to whether there was an anticipatory breach of the contract. Do not use the second bracketed paragraph if the contract involves a sale of goods and is governed by Ark. Code Ann. § 4-2-610 or 4-2-611.

COMMENT

This instruction was cited with approval as to the definition of ma-

terial breach in *Roberts Contracting Co. v. Valentine-Wooten Road Public Facility Board*, 2009 Ark. App. 437, 320 S.W.3d 1 (2009).

"When performance of a duty under a contract is contemplated, any non-performance of that duty is a breach." *Zufari v. Architecture Plus*, 323 Ark. 411, 914 S.W.2d 756 (1996), *citing* RESTATEMENT (SECOND) OF CONTRACTS § 235 (2) (1981).

In *TXO Production Corp. v. Page Farms, Inc.*, 287 Ark. 304, 698 S.W.2d 791 (1985), the court discussed material breach in terms of a prior breach by a plaintiff and whether performance by the defendant is thereby excused: "If the plaintiff's breach is material and sufficiently serious, the defendant's obligation to perform may be discharged. RESTATEMENT OF CONTRACTS, § 397 (1932). Not so, however, if the plaintiff's breach is comparatively minor. Corbin states the basic rule: 'If one party to a bilateral contract commits a partial breach of his duty, one that is not so material as to discharge the other party's duty of performance, the latter's only remedy is damages for the partial breach.' CORBIN, CONTRACTS, § 1253 (1962)."

"Where there is a material breach of contract, substantial nonperformance and entire or substantial failure of consideration, the injured party is entitled to rescission of the contract and restitution and recovery back of money paid." *Economy Swimming Pool Co. v. Freeling*, 236 Ark. 888, 370 S.W.2d 438 (1963).

In *Cox v. McLaughlin*, 315 Ark. 338, 867 S.W.2d 460 (1993), the court cited *Stocker v. Hall*, 269 Ark. 468, 602 S.W.2d 662 (1980) for the propositions that "the failure of one party to perform can excuse the other from his obligation" and that "when a party to a contract has, either by words or conduct, definitely manifested an intention not to perform, the other party may treat the contract as ended."; *See also* *Jim Orr & Assoc., Inc. v. Waters*, 299 Ark. 526, 530-531, 773 S.W.2d 99, 102 (1989) (applying the doctrine of anticipatory breach); *De Lukie v. American Petroleum Co.*, 170 Ark. 453, 461, 280 S.W. 669, 673 (1926) ("Positive notice of intended breach of contract to be performed in the future may be treated by the adverse party as an actual breach."); *Bank of Cabot v. Bledsoe*, 9 Ark. App. 145, 148-149, 653 S.W.2d 144, 145-146 (1983) ("[T]he doctrine of anticipatory breach does not apply to contracts which have as their unperformed part merely the duty to pay money at specified times.");

"[A] client's exercise of the right to discharge an attorney *with or without cause* does not constitute a breach of contract because it is a basic term of the contract, implied by law into it by reason of the nature of the attorney-client relationship, that the client may terminate that contract at any time." *Crockett & Brown, P.A. v. Courson*, 312 Ark. 363, 849 S.W.2d 938 (1993) (providing that a discharged attorney can nonetheless recover the reasonable value of her services to the date of discharge) (emphasis in original).

Arkansas does not recognize a cause of action for tortious breach of

contract. *Quinn Companies, Inc. v. Herring-Marathon Group, Inc.*, 299 Ark. 431, 773 S.W.2d 94 (1989) ("The breach itself simply is not a tort.").

Research References

West's Key Number Digest

Contracts ⇨353(8)

Legal Encyclopedias

C.J.S., Contracts §§ 1034 to 1041, 1040, 1065

AMI 2428

SUBSTANTIAL PERFORMANCE

The parties dispute whether _____ did what
[plaintiff/defendant]
their contract required of [him][her][it]. A party may
recover on a contract even if [he][she][it] did not do
everything that the contract required of [him][her][it]
if [his][her][its] performance was substantial.

_____ contends and has the burden of
[Plaintiff/Defendant]
proving that [he][she][it] substantially performed
[his][her][its] contract with _____. Substantial
[defendant/plaintiff]
performance cannot be determined by a mathematical
rule. In determining whether performance was sub-
stantial, you should consider the following factors:

(1) The extent to which _____ will be
[plaintiff/defendant]
deprived of the benefit that [he][she] reasonably
expected;

(2) The extent to which _____ can be
[plaintiff/defendant]
adequately compensated for the benefit of which
[he][she] will be deprived;

(3) The extent to which _____ will suffer
[plaintiff/defendant]
forfeiture;

(4) The likelihood that _____ will cure
[plaintiff/defendant]
[his][her][its] failure, taking into account all circum-
stances, including any reasonable assurance that the
failure will be cured; and

(5) The extent to which the behavior of [plaintiff/defendant] is consistent with standards of good faith and fair dealing.

COMMENT

This instruction is based on *Roberts Contracting Co. v. Valentine-Wooten Road Public Facility Board*, 2009 Ark. App. 437, at 8, 320 S.W.3d 1, 7–8 (citing *Cox v. Bishop*, 28 Ark. App. 210, 213, 772 S.W.2d 358, 359–60 (1989)). The five factors set out in the instruction are taken from the Restatement (Second) of Contracts and were first cited with approval in *Prudential Insurance Co. of America v. Stratton*, 14 Ark. App. 145, 151–52, 685 S.W.2d 818, 822 (1985) (citing Restatement (Second) of Contracts §§ 237 cmt. d, 241 (1981)). In *Roberts & Co. v. Sergio*, the court further explained that “[s]ubstantial performance cannot be determined by a mathematical rule relating to the percentage of the cost of completion, and the issue of substantial performance is a question of fact.” 22 Ark. App. 58, 60, 733 S.W.2d 420, 421 (1987) (internal citations omitted).

Research References

West’s Key Number Digest

Contracts ⇨353(8)

Legal Encyclopedias

C.J.S., Contracts §§ 1004, 1034 to 1041, 1065

to satisfy on AMI 2429

the right to tender TENDER

 contends that *[he][she][it]* did what
[Plaintiff/Defendant]
the contract required of *[him][her][it]* by tendering
[his][her][its] performance to . “Tender” is
[defendant/plaintiff]

a party’s timely and good faith offer to perform under the contract and that party’s present ability to immediately perform. To be effective, the tender must be made in accordance with the terms of the contract and on or before the time the performance of the party making the tender is due. In addition, the tender must be communicated to the other party.

[If the parties’ contract does not specify a time for performance, the tender must be made within a reasonable time.]

[If the parties’ contract does not specify the place of performance, the tender must be made at some reasonably convenient place, and the party making the tender must notify the other party of the place of tender.]

NOTE ON USE

Use the first bracketed paragraph when there is an issue as to the time for tender.

Use the second bracketed paragraph when there is an issue as to the place for tender.

COMMENT

The concept of tender involves both questions of law and fact. The trial court must first determine whether tender is required. For example, tender is not required when tender would be a vain and useless effort. *Loveless v. Diehl*, 235 Ark. 805, 364 S.W.2d 317 (1962); *Miller v. Willey*, 257 Ark. 961, 521 S.W.2d 68 (1975).

This instruction states the general rule concerning tender. See *Telcoe Credit Union v. Eackles*, 293 Ark. 149, 151, 732 S.W.2d 477, 478 (1987); *Loveless, supra*; *Miller, supra*; 17A AM. JUR. 2D, CONTRACTS § 615 (1991).

Research References

West's Key Number Digest
Contracts §353(8)

Legal Encyclopedias
C.J.S., Contracts §§ 1004, 1034 to 1041, 1065

DEFENSES

AMI 2430

DEFENSE—CANCELLATION

 contends that the parties canceled their
[Defendant] contract and that it is no longer enforceable.

In order to establish [his][her][its] claim,
[defendant] must prove each of two essential propositions:

First, that the parties' contract had not been fully performed by [both] [all] parties; and

Second, that [both] [all] agreed to cancel the contract.

An agreement to cancel a contract may be oral, written, or implied by the conduct of the parties. [If the agreement to cancel is oral, it must be proven by clear and convincing evidence. "Clear and convincing evidence" is proof so clear, direct, weighty, and convincing as to enable you to come without hesitation to a clear conviction of the matter asserted.]

[If you find from the evidence in this case that both of these propositions have been proved, then your verdict should be for].
[defendant]

NOTE ON USE

If the contract in question involves a sale of goods that is governed by Ark. Code Ann. § 4-2-106, do not use this instruction.

Use the first bracketed sentence concerning clear and convincing evidence when the original contract was in writing and the alleged cancellation is by oral agreement.

Do not use the second bracketed sentence when the case is submitted on interrogatories.

COMMENT

When rescission of a written contract is based upon an alleged oral agreement, the burden of proof is clear and convincing evidence. *Clark v. Duncan*, 214 Ark. 83, 214 S.W.2d 493 (1948). The burden of proof for cancellation of an oral contract is apparently a preponderance of the evidence: *Leonard v. Downing*, 246 Ark. 397, 438 S.W.2d 327 (1969).

For additional discussion on the appropriate burden of proof, see the Comment to AMI 2425.

Research References

West's Key Number Digest
Contracts ¶353(7)

Legal Encyclopedias
C.J.S., Contracts §§ 1045, 1065

AMI 2431

DEFENSE—ACCORD AND SATISFACTION

_____ contends and has the burden of proving
[Defendant] that an accord and satisfaction occurred as to _____
[defen-
dant]'s obligations under the parties' contract. In order
to establish [his][her][its] claim, _____ must prove
[defendant] each of three essential propositions:

First, that the parties agreed that one would accept from the other a different performance in full satisfaction of the performance required by their contract;

Second, that both parties understood that their rights and obligations under their original contract would be canceled by their agreement; and

Third, that the party obligated to perform the substituted obligation actually performed it.

[If you find from the evidence in this case that each of these propositions has been proved, then your verdict should be for _____].
[defendant]

NOTE ON USE

If the case involves an instrument within the meaning of Ark. Code Ann. § 4-3-311, which provides special rules when an instrument is tendered in full satisfaction of a claim, this instruction may not be appropriate.

Do not use the bracketed sentence when the case is submitted on interrogatories.

COMMENT

This instruction is based on *Fort Smith Finance Corp. v. Parrish*,

302 Ark. 299, 789 S.W.2d 723 (1990); *Jewell v. General Air Conditioning Corp.*, 226 Ark. 304, 289 S.W.2d 881 (1956); and *Mass. Mut. Life Ins. Co. v. Peoples Loan & Inv. Co.*, 191 Ark. 982, 88 S.W.2d 831 (1935). This instruction was recognized as a proper statement of Arkansas law in *Trammell v. Hooks*, 2013 Ark. App. 576. Absent a dispute as to the performance required under the original contract, part-performance of the original contract cannot provide the basis for accord and satisfaction. *Inge v. Walker*, 70 Ark. App. 114, 15 S.W.3d 348 (2000); Restatement (Second) of Contracts § 278, illus. 3 (1981).

The Committee has not prepared an instruction on the issue of novation. Novation is a species of accord and satisfaction, *Harris v. Wildcat Corp.*, 97 Idaho 884, 556 P.2d 67, 69 (1976), and occurs in the infrequent situation when a new party, who was neither entitled to performance nor owed a duty under the original contract, is substituted in a new contract. *Harrison v. Benton State Bank*, 6 Ark. App. 355, 642 S.W.2d 331 (1982). If the present instruction on accord and satisfaction is not satisfactory in a particular case involving the issue of novation, this instruction should be modified.

Research References

West's Key Number Digest
Trial ¶251(4)

Legal Encyclopedias
C.J.S., Accord and Satisfaction §§ 16, 82; Contracts § 1065

AMI 2432

DEFENSE—RELEASE

 contends and has the burden of proving
[Defendant]
that released [him][her][it] from the parties'
[plaintiff]
contract.

In order to establish [his][her][its] claim,
[defendant]
must prove each of two essential propositions:

First, that the parties entered into a written agreement by which one of the parties gave up [his][her][its] rights under the contract; and

Second, that there was consideration for the written agreement.

[If you find from the evidence in this case that both of these propositions have been proved, then your verdict should be for].
[defendant]

NOTE ON USE

If there are more than two parties to the contract, this instruction should be modified.

Do not use the bracketed sentence when the case is submitted on interrogatories.

COMMENT

See Green v. Owens, 254 Ark. 574, 495 S.W.2d 166 (1973); *Skinner v. Fisher*, 120 Ark. 91, 178 S.W. 922 (1915); RESTATEMENT (SECOND) OF CONTRACTS § 284 (1981).

Research References

West's Key Number Digest
Release ◊59

Legal Encyclopedias
C.J.S., Contracts §§ 1045, 1065

AMI 2433

DEFENSE—FRAUD IN INDUCEMENT

 contends that fraudulently induced
[Defendant] [plaintiff]
[him][her][it] to enter into the contract and has the
burden of proving each of five essential propositions:

First, that made a false representation of
[plaintiff]
material fact concerning the contract;

Second, that knew that the representation
[plaintiff]
was false when it was made;

Third, that the representation was made for the
purpose of inducing to enter into the contract;
[defendant]

Fourth, that justifiably relied upon the rep-
[defendant]
resentation; and

Fifth, that would not have entered into the
[defendant]
contract except for the false representation.

A fact or statement is material if it was a substan-
tial factor in influencing 's decision. It is not
[defendant]
necessary, however, that it be the paramount or
decisive factor, but only one that a reasonable person
would attach importance to it in making a decision.

[If you find from the evidence in this case that
each of these propositions has been proved, then
your verdict should be for].
[defendant]

NOTE ON USE

Do not use the bracketed sentence if the case is submitted on interrogatories.

COMMENT

This instruction is based on *Undem v. First Nat. Bank, Springdale, Ark.*, 46 Ark. App. 158, 164, 879 S.W.2d 451, 454 (1994) (question of fact existed as to whether former director of borrower could avoid liability on a note to the bank because bank's agent fraudulently induced him to sign note by falsely representing that he would not be liable unless he remained on the borrower's board of directors); and AMI 402. This instruction does not address fraud by concealment or failure to disclose. If the alleged fraud is concealment or failure to disclose, this instruction should be modified. See discussion in Comment to AMI 402 on when silence can be actionable fraud.

Research References

West's Key Number Digest
Contracts §353(5)

Legal Encyclopedias
C.J.S., Contracts §§ 1017, 1065

COMMENT

This instruction is based on *Dent v. Wright*, 322 Ark. 256, 909 S.W.2d 302 (1995). In *Dent*, the court specifically recognized that a contract may be invalidated by undue influence, and the court approved the generally recognized rules in RESTATEMENT (SECOND) OF CONTRACTS § 177 (1981); and 17A AM. JUR. 2D, Contracts § 237 (1991).

Research References

West's Key Number Digest
Contracts §353(5)

Legal Encyclopedias
C.J.S., Contracts §§ 1015, 1065

AMI 2435

DEFENSE—DURESS

 contends that *[he][she][it]* entered into the contract with under duress and has the burden of proving each of three essential propositions:

[Defendant]

[plaintiff]

First, that *[he][she][it]* involuntarily accepted the terms of the contract;

Second, that *[he][she][it]* had no reasonable alternative other than to accept those terms; and

Third, that *[his][her][its]* acceptance of those terms was the result of threats or coercive acts of

[plaintiff].

[If you find from the evidence in this case that each of these propositions has been proved, then your verdict should be for].

[defendant]

NOTE ON USE

If the contract involves a sale of goods and presents an issue of unconscionability governed by Ark. Code Ann. § 4-2-302, do not use this instruction.

If the defendant alleges that the duress was caused by a person not a party to the transaction, this instruction should be modified. See RESTATEMENT (SECOND) OF CONTRACTS § 175(2) (1981).

Do not use the bracketed sentence if the case is submitted on interrogatories.

COMMENT

This instruction is based on Cox v. McLaughlin, 315 Ark. 338, 867 S.W.2d 460 (1993) (reversing trial court's summary judgment that

declared a contract was entered under duress where reasonable minds could reach different conclusions on the facts relating to duress), citing *W.R. Grimshaw Co. v. Mevil C. Winthrow Co.*, 248 F.2d 896 (8th Cir. 1957), cert. denied, 356 U.S. 912 (1958), and *Oberstein v. Oberstein*, 217 Ark. 80, 228 S.W.2d 615 (1950).

Duress may be economic. *Cox*, 315 Ark. at 345, 867 S.W.2d at 463. "Economic duress does not exist, however, merely because a person has been a victim of a wrongful act; in addition the victim must have no choice but to agree to the other party's terms or face *serious financial hardship*." *Id.* (quoting from and adopting standard announced in *Totem Marine Tug & Barge, Inc. v. Alyeska Pipeline*, 584 P.2d 15, 22 (Alaska 1978) (emphasis added in *Cox*).

"What constitutes a reasonable alternative is a question of fact, depending on the circumstances of each case." *Cox*, 315 Ark. 345-346, 867 S.W.2d at 463 (quoting *Totem*).

If the party claiming duress fails to act within a reasonable time after the circumstances that gave rise to the duress have ceased, he may lose the power to avoid the contract. See Restatement (Second) of Contracts § 381 (1981). This concept has also been described as a ratification. The court in *Oberstein* stated that ratification may result "if the party entering into the contract under duress accepts the benefits growing out of it or remains silent or acquiesces in the contract for any considerable length of time after opportunity is afforded to avoid it or have it annulled." 217 Ark. at 88, 228 S.W.2d at 621 (quoting *Page v. Woodson*, 211 Ark. 289, 200 S.W.2d 768 and 17 Am.Jur. 902) (rejecting the wife's claim of duress to void a divorce decree where she accepted support checks for approximately six months before seeking to invalidate the decree).

Research References

West's Key Number Digest
Contracts ⚙353(5)

Legal Encyclopedias
C.J.S., Contracts §§ 1020, 1065

AMI 2436

DEFENSE—WAIVER—GENERAL RULE

 contends that waived *[a right]*
[Defendant] *[plaintiff]*
[(his)(her)(its) rights] under their contract and has the
 burden of proving two essential propositions:

First, that knew *[he][she][it]* had the
[plaintiff]
 contract right(s); and

Second, that voluntarily and intentionally
[plaintiff]
 abandoned the right(s).

[If you find from the evidence in this case that
 both of these propositions have been proved, then
 your verdict should be for].
[defendant]

NOTE ON USE

Use this instruction when the defendant alleges the defense of
 waiver by abandonment of the contract right.

Do not use the bracketed sentence when the case is submitted on
 interrogatories.

COMMENT

This instruction is based on *Bharodia v. Pledger*, 340 Ark. 547, 11 S.W.3d 540 (2000) (rejecting waiver claim where contracting party's alleged waiver of right to terminate the contract was not knowing and intentional), citing *Grayson-McLeod Lumber Co. v. Slack Kress Tie & Stave, Co.*, 102 Ark. 79, 143 S.W. 581 (1912); *see also Jet Asphalt & Rock Co. v. Angelo Iafrate Const., LLC*, 431 F.3d 613 (8th Cir. 2005) (recognizing long established rule in Arkansas that a "party may waive a breach of a condition set forth in a written contract by permitting the other party to proceed with performance of the contract after discovering the apparent breach").

In *Azzore Veterinary Specialists, LLC v. Hodgson*, 2015 Ark. App. 158, 456 S.W.3d 795 (2015), the Court of Appeals reversed the trial

court's grant of summary judgment and held that there was a question of fact as to whether the employer had permanently waived its rights when the employer's office manager sent an email to an employee stating: "Since you started so late in the year, we waived the year-end calculation/account balance for 2010." The claim of a factual question was supported by an affidavit from the office manager stating it was not her intention to permanently deprive the employer of its right but to temporarily refrain from collecting the amount owed, and the parties' employment agreement that provided that the failure to insist on strict compliance would not constitute a waiver.

Research References

West's Key Number Digest
Contracts ◊353(1)

Legal Encyclopedias
C.J.S., Contracts §§ 1041, 1065

AMI 2437

DEFENSE—WAIVER OF BREACH BY ACCEPTANCE OF BENEFITS

 contends that waived a breach of
 [Defendant] [plaintiff]
 their contract and has the burden of proving two essential propositions:

First, that knew had breached their
 [plaintiff] [defendant]
 contract; and

Second, that continued to accept benefits
 [plaintiff]
 under the contract and allowed to continue
 [defendant]
 [his][her][its] performance of the contract.

[If you find from the evidence in this case that both of these propositions have been proved, then your verdict should be for].
 [defendant]

NOTE ON USE

Use this instruction when the defendant contends that the plaintiff waived his right to claim a breach of contract by acceptance of benefits.

If the contract is governed by Ark. Code Ann. § 4-1-207, this instruction may not be appropriate.

Do not use the bracketed paragraph when the case is submitted on interrogatories.

COMMENT

This instruction is based on *Southern Pipe Coating, Inc. v. Spear & Wood Mfg. Co.*, 235 Ark. 1021, 1024, 363 S.W.2d 912, 914 (1963) (“[O]ne party to a contract who, with knowledge of a breach by the other party, continues to accept benefits under the contract and suffers the other party to continue in performance thereof, waives the right to insist on the breach”) and *Stephens v. West Pontiac—GMC, Inc.*, 7 Ark. App. 275, 278, 647 S.W.2d 492, 493 (1983) (same).

Waiver of a breach under Arkansas law must be “voluntary, knowing, and intentional.” *All-Ways Logistics, Inc. v. USA Truck, Inc.*, 583 F.3d 511, 517 (8th Cir. 2009). Consequently, the submission of this instruction must be supported by evidence that the claimant has manifested an intent to waive the alleged breach. *Id.* In the absence of such evidence, this instruction should not be submitted. *See id.* at 517–18 (affirming the trial court’s refusal to submit AMI 2437 where the plaintiff’s continued acceptance of defendant’s performance for several years after the breach was under a different part of the severable contract and the plaintiff’s complaints on numerous occasions about the breach were contrary to “an affirmative indication that the breach was acceptable”); *McCourt Mfg. Corp. v. Rycroft*, 2009 Ark. 332, at 8–9, 322 S.W.3d 491, *appeal after remand* 2010 Ark. 93 (affirming the trial court’s refusal to submit an instruction on waiver where the plaintiff, an employee of the defendant, consistently maintained that he was due the quarterly commissions sought in the case but remained in the employ of the defendant for several months because of his need to continue to work and statements by the defendant that the commissions might be addressed in the future).

Research References

West’s Key Number Digest
Contracts ⅈ353(9)

Legal Encyclopedias
C.J.S., Contracts §§ 1041, 1065

AMI 2438

DEFENSE—ESTOPPEL

 contends that should be estopped
[Defendant] [plaintiff]
from claiming a breach of contract and has the burden
of proving each of four essential propositions:

First, knew (*state the particular fact(s) on*
[plaintiff]
which the estoppel is based);

Second, reasonably should have expected
[plaintiff]
that would act upon [his][her][its] [words] or
[defendant]
[conduct];

Third, was unaware of (*state the particular*
[defendant]
fact(s) on which the estoppel is based); and

Fourth, relied in good faith upon 's
[defendant] [plaintiff]
[words] [conduct] [or] [silence] to [his][her][its]
detriment.

[If you find from the evidence in this case that
each of these propositions has been proved, then
your verdict should be for].
[defendant]

NOTE ON USE

If the defense of estoppel is based solely on the silence of the plaintiff, modify this instruction as indicated in the Comment.

The facts that are the basis of the alleged estoppel should be stated briefly and neutrally.

Do not use the bracketed paragraph if the case is submitted on interrogatories.

COMMENT

The elements of estoppel were stated in *Bedford v. Fox*, 333 Ark. 509, 970 S.W.2d 251 (1998), and more recently in *Evans v. Hamby*, 2011 Ark. 69. Estoppel involves conduct of both parties. *Continental Ins. Cos. v. Stanley*, 263 Ark. 638, 569 S.W.2d 653 (1978) (distinguishing estoppel from waiver).

Silence may give rise to an estoppel defense. In order for silence alone to constitute an estoppel, there must be both the opportunity and the duty to speak, the action of the person asserting the estoppel must be the natural result of the silence, and the silent person must have been in a situation to know that someone was relying on the silence to his injury. *First National Bk. v. Godbey & Sons*, 181 Ark. 1004, 1110, 29 S.W.2d 271, 275 (1930) (plaintiff not estopped from recovering from the defendant bank where the plaintiffs did nothing to mislead the bank or induce its action). See also *Anadarko Petroleum Co. v. Venable*, 312 Ark. 330, 341-342, 850 S.W.2d 302, 308 (1993) (plaintiff not barred from suit by signing royalty division order which did not ratify the calculation of the share given to the plaintiff); *Lavaca School Dis. No. 3 v. Charleston School Dist. No. 9*, 304 Ark. 104, 800 S.W.2d 703 (1990) (silence alone constituted grounds for the estoppel where the plaintiff district did not complain for forty years to the defendant's collection of taxes from the disputed territory). In cases in which silence alone is alleged as grounds for the estoppel, two modifications to the instruction should be made:

The second element should be replaced with the following:

Second, the circumstances were such that [plaintiff] reasonably should have known that [defendant] was relying on his silence, and [plaintiff] had the opportunity to speak and under the circumstances should have spoken;

Following the fourth element, insert:

Fifth, [defendant's] action was the natural result of the [plaintiff's] silence.

The Arkansas Supreme Court has held that the right to jury trial exists with regard to the defense of estoppel, stating "[o]ur case law is quite clear that estoppel *in pais* or equitable estoppel may be pled in both courts of equity and courts of law." *Northwestern Nat'l Life Ins. Co. v. Heslip*, 302 Ark. 310, 312-13, 790 S.W.2d 152, 153 (1990) (reversing the trial court's refusal to instruct the jury on the defense of estoppel pled in the case). For a discussion of the right to jury trial for the claim of promissory estoppel, see AMI 2444, Comment.

Research References

West's Key Number Digest
Estoppel ⇨120

Legal Encyclopedias
C.J.S., Estoppel and Waiver § 293

contracts that (b) the [?] performance
of the contract was impossible and has the burden of
proving each of two essential propositions:

(a) that performance became impossible as
a result of a [?] event, and (b) that the
event was the result of a [?] cause
of law (such as a contract only).

If you find from the evidence in this case that
both of these propositions have been proved, then

your verdict should be for the [?]

the law and the fact [?] in the case [?] a rule of
law and is governed by [?] (the [?] of [?] and [?]).

The [?] of the [?] [?] [?] [?] [?] [?] [?]

In [?] [?] [?] [?] [?] [?] [?] [?] [?] [?]

[?] [?] [?] [?] [?] [?] [?] [?] [?] [?]

The [?] [?] [?] [?] [?] [?] [?] [?] [?] [?]

AMI 2439

DEFENSE—IMPOSSIBILITY OF PERFORMANCE

 contends that *[his][her][its]* performance
[Defendant]
of the contract was impossible and has the burden of
proving each of two essential propositions:

First, that diligently attempted to perform
[defendant]
the contract; and

Second, that performance became impossible as
a result of *(describe the legally recognized event on
which the defendant relies, e.g., Act of God, change
of law, death of essential party)*.

[If you find from the evidence in this case that
both of these propositions have been proved, then
your verdict should be for].
[defendant]

NOTE ON USE

Do not use the instruction when the contract involves a sale of
goods and is governed by Ark. Code Ann. §§ 4-2-614, 4-2-615 or 4-2-616.

Do not use the bracketed paragraph when the case is submitted on
interrogatories.

COMMENT

In *Christy v. Pilkinton*, 224 Ark. 407, 273 S.W.2d 533 (1954), the
Arkansas Supreme Court distinguished between objective impossibility
(i.e., the thing cannot be done) and subjective impossibility (i.e., I can-
not do it). Subjective impossibility does not discharge a party's
contractual duty. The distinction between objective and subjective
impossibility is not incorporated into this instruction. Instead, where
the trial court determines that the alleged impossibility is solely subjec-
tive, it should not submit the issue to the jury.

The party alleging impossibility of performance must demonstrate
that virtually every effort to perform the duty under the contract was

taken, and that performance cannot be accomplished by any means. Resolving the issue requires examining the conduct of the party asserting the defense to determine the presence or absence of fault in failing to perform. *Frigillana v. Frigillana*, 266 Ark. 296, 584 S.W.2d 30 (1979).

Where the contract cannot be performed due to action by a governmental agency, impossibility of performance is a valid defense. *Smith v. Decatur School District*, 2011 Ark. App. 126.

At least in the arbitration context, the Arkansas Supreme Court has followed the majority approach in recognizing a distinction between provisions that involve “ancillary logistical concerns,” the impossibility of performance of which does not render the contract unenforceable, and “integral terms,” the impossibility of performance of which may do so. In *Courtyard Gardens Health & Rehab., LLC v. Arnold*, 2016 Ark. 62, 12-17, and *GGNSC Holdings, LLC v. Lamb by & through Williams*, 2016 Ark. 101, 16-18, the court held that the agreements’ specification of the National Arbitration Forum Code, which provides for arbitration only by the NAF itself, involved an “ancillary logistical concern,” such that NAF’s unavailability did not render the arbitration agreements impossible to perform.

Research References

West's Key Number Digest

Contracts ⚡353(8)

Legal Encyclopedias

C.J.S., Contracts §§ 1036, 1065

AMI 2440

DEFENSE—DISABLING ILLNESS

 contends and has the burden of proving
[Defendant]
that *[his][her]* disabling illness excused *[his][her]* performance of the contract. If a party contracts to perform a service that is purely personal, then the disabling illness of that party will excuse *[his][her]* performance.

[If the parties' contract contains (a) separate agreement(s) that (is) (are) not purely personal, and the agreement(s) pertaining to non-personal matters can be severed from the agreement relating to purely personal service, then the agreement(s) relating to non-personal matters may still be enforced.]

[If you find from the evidence in this case that this proposition has been proved, then your verdict should be for].
[defendant]

NOTE ON USE

Use the first bracketed paragraph when there is a contract that calls for performance that does not constitute a purely personal service.

Do not use the second bracketed paragraph when the case is submitted on interrogatories.

COMMENT

This instruction is based on *Joshua v. McBride*, 19 Ark. App. 31, 716 S.W.2d 215 (1986).

Research References

West's Key Number Digest
Contracts ⅇ353(8)

Legal Encyclopedias
C.J.S., Contracts §§ 1036, 1065

AMI 2441

**DEFENSE—PLAINTIFF'S PREVENTION OF
PERFORMANCE**

 contends that prevented complete
[Defendant] [plaintiff]
performance of their contract by and has the
[defendant]
burden of proving this contention.

The failure of to perform their contract is
[defendant]
excused if [his][her][its] performance is prevented or
hindered by the conduct of the .
[plaintiff]

[If you find from the evidence in this case that
this proposition has been proved, then your verdict
should be for].
[defendant]

NOTE ON USE

Do not use this instruction if the contract involves a sale of goods and is governed by a provision of the Uniform Commercial Code, such as Ark. Code Ann. §§ 4-2-614, 4-2-615 or 4-2-616.

Do not use the bracketed paragraph if the case is submitted on interrogatories.

COMMENT

In *Townes v. Oklahoma Mill Co.*, 85 Ark. 596, 599, 109 S.W. 548, 549 (1908), the court stated, "there is no breach of contract where performance is prevented by the conduct of the other party. The party whose own conduct prevents performance cannot complain of nonperformance." This principle was observed in *Harris v. Holder*, 217 Ark. 434, 230 S.W.2d 645 (1950) and *Cantrell-Waind & Associates, Inc. v. Guillaume Motorsports, Inc.*, 62 Ark. App. 66, 968 S.W.2d 72 (1998).

Research References

West's Key Number Digest
Contracts ◊353(8)

Legal Encyclopedias
C.J.S., Contracts §§ 1036, 1065

DAMAGES

AMI 2442

DAMAGES—GENERAL RULE

[If you decide for _____ on the question of li-
ability] [If an interrogatory requires you to assess the
damages of _____], you must then fix the amount of
money that _____ proved will reasonably and fairly
compensate [him][her][it] for the element(s) of dam-
age resulting from _____ breach of contract. [In or-
der to fairly compensate _____, any award should put
_____ in no better position than [he][she][it] would
have been in if both _____ and _____ had performed
all of their promises under the contract.]

The element(s) of damage that _____ claims [is]
[are]:

[Here insert the elements.]

[First:]

[Second:]

[Third:]

[etc.]

Whether [this] [any of these (insert number)] ele-
ment(s) of damage has been proved by the evidence
is for you to determine.

NOTE ON USE

Complete this instruction with the measure(s) of damage permitted by law or the measure agreed upon by the parties in their contract. If the proper measure of direct damages includes lost profits, see AMI 2206.

Use only this instruction when no consequential damages are alleged. If consequential damages, including lost profits as an element of consequential damages, are appropriate, use this instruction and also use AMI 2443.

If nominal damages are alleged, refer to AMI 419 and modify that instruction for use in a contract case.

Do not use the bracketed second sentence in the first paragraph of the instruction if the only element of damages is liquidated damages. If liquidated damages are determined as a matter of law, do not use this instruction.

This instruction is designed to be used both for claims of breach of contract and promissory estoppel that may be submitted to a jury. If this instruction is used with a claim of promissory estoppel, the word "promise" should be used in place of "contract".

If there is evidence that the party claiming damages has failed to mitigate damages, see AMI 2230.

COMMENT

"The underlying purpose in awarding damages for breach of contract is to place the injured party in as good [of a] position as he would have been had the contract been performed." *Bowman v. McFarlin*, 1 Ark. App. 235, 239, 615 S.W.2d 383, 385 (1981); (measure of damages in a construction contract). *See also* *Rebsamen Cos., Inc. v. Ark. State Hosp. Emps. Fed. Credit Union*, 258 Ark. 160, 162-63, 522 S.W.2d 845, 847 (1975) (vehicle sales contract).

"Damages must arise from the wrongful acts of the breaching party." *Spann v. Lovett & Co.*, 2012 Ark. App. 107, at 16, 389 S.W.3d 77, 91; *Dawson v. Temps Plus, Inc.*, 337 Ark. 247, 258, 987 S.W.2d 722, 728 (1999). "The injured party is limited to damages based on his actual loss caused by the breach." *RESTATEMENT (SECOND) OF CONTRACTS* § 347 cmt. e (1981). *See also* *Bank of Am., N.A. v. C.D. Smith Motor Co.*, 353 Ark. 228, 245-47, 106 S.W.3d 425, 434-35 (2003) (repeating the "arise from" requirement in *Dawson* but also referring to testimony that the breach most likely "caused" the plaintiff's damages). Causation of damages is included in this damage instruction, rather than the issue instruction for breach of contract, because a plaintiff is entitled to recover nominal damages in the absence of proof of actual damages. *See*

AMI 2401, cmt.; *Crumpacker v. Gary Reed Constr., Inc.*, 2010 Ark. App. 179, at 3, 374 S.W.3d 162 (“[P]roof of causation is not an element of a claim for breach of contract or breach of implied warranty of habitability”).

Model instructions from several other states use the term “resulting from,” or a variation thereof, as the element of causation of damages in contract cases. See COLO. JURY INSTRUCTIONS, 4TH—CIVIL 30.37 (requiring a finding of actual damages “as a result of” the breach); ILL. PATTERN JURY INSTRUCTIONS—CIVIL 700.02V (2008 ed.) (requiring plaintiff to prove it sustained damage “resulting from” defendant’s breach); N.Y. PATTERN JURY INSTRUCTIONS—CIVIL 4:20, cmt. (final element of cause of action for breach of contract is “resulting damage”); TEX. PATTERN JURY CHARGES—BUS., CONSUMER, INS. & EMPLOYMENT 110.2 (2006 ed.) (charging the jury to determine the damages, if any, that “resulted from” a failure to comply with the contract). In *Crumpacker*, the court held that a plaintiff seeking actual damages should prove the monetary damages sustained “as a result of” the defendant’s breach. 2010 Ark. App., 179 at 4–5, 374 S.W.3d 162, 164. The Arkansas courts also use the term “resulting from” to describe causation in the doctrine of avoidable consequences, i.e., mitigation of damages. See *Bill C. Harris Constr. Co. v. Powers*, 262 Ark. 96, 104–05, 554 S.W.2d 332, 336 (1977) (stating that under the doctrine, in both contract and tort cases, the plaintiff cannot recover damages “resulting from” consequences which he could reasonably avoid); *Beardsley v. Pennino*, 19 Ark. App. 123, 127, 717 S.W.2d 825, 827 (1986) (holding in a contract case that the appellant’s alleged “set-off” “is not a recovery for damages resulting from consequences that appellee reasonably could have avoided”).

The proper measure of damages will depend upon the nature of the contract claim in each case. For example, depending upon the nature of his claim, the plaintiff may seek damages based either upon his expectancy or his reliance. See generally Howard W. Brill, *Law of Damages* § 17:1 (5th ed. 2004). However, case law provides specific measures of damage for the breach of certain contracts. See, e.g., *Johnston v. Curtis*, 70 Ark. App. 195, 204, 16 S.W.3d 283, 289 (2000) (measure of damages for vendee’s breach of executory contract for sale of land is difference between contract price and market value at time of breach, less portion of purchase price already paid).

In situations involving less than full performance, the measure of damages also varies depending upon the type of claim. Among the various measures of damages for such claims are the following:

Partial performance: “[T]he fair value of the benefits resulting from the partial performance.” *Lynch v. Stephens*, 179 Ark. 118, 127, 14 S.W.2d 257, 261 (1929). See also 17A AM. JUR. 2D CONTRACTS § 621 (2004).

Substantial performance: the contract price less the reasonable costs of completing the contract and the reasonable costs

of remedying any defects. *Prudential Ins. Co. of Am. v. Stratton*, 14 Ark. App. 145, 150, 685 S.W.2d 818, 821 (1985). In cases in which performance is not substantial but recovery should be allowed on a quantum merit basis, see generally *Cox v. Bishop*, 28 Ark. App. 210, 772 S.W.2d 358 (1989), and *Pickens v. Stroud*, 9 Ark. App. 96, 653 S.W.2d 146 (1983).

Performance excused: reasonable compensation for the service actually rendered. *Lynch v. Stephens*, 179 Ark. 118, 127, 14 S.W.2d 257, 261 (1929).

Performance prevented: the contract price less the cost "to complete the contract," or "the reasonable value of his performance." *Royal Manor Apts. v. Powell*, 258 Ark. 166, 170, 523 S.W.2d 909, 911 (1975) (When performance is prevented, Arkansas law recognizes alternative measures of damages.).

If the parties' contract provides for mandatory liquidated damages, the amount of the liquidated damages should be inserted as the sole element of damages. See *McMaster v. McIlroy Bank*, 9 Ark. App. 124, 128, 654 S.W.2d 591, 594 (1983). However, if the liquidated damage provision in the contract is not mandatory, the plaintiff has the option of seeking actual damages or liquidated damages. *Id.*, 654 S.W.2d at 594. For a general discussion of the enforceability of liquidated damage provisions, see *Johnson v. Jones*, 33 Ark. App. 149, 152-53, 807 S.W.2d 39, 41-42 (1991).

Research References

West's Key Number Digest

Damages ◊218

Legal Encyclopedias

C.J.S., Damages §§ 307 to 317, 432

AMI 2443

**DAMAGES—CONSEQUENTIAL DAMAGES—TACIT
AGREEMENT RULE**

In order to recover money in addition to the damages defined in the previous instruction, ^[plaintiff] has the burden of proving each of two essential propositions:

First, that ^[defendant] knew *[his][her][its]* breach of the parties' contract would result in consequential damages to ^[plaintiff]; and

Second, that the circumstances under which ^[defendant] made the contract were such that ^[defendant] should have understood that *[he][she][it]* had agreed to assume responsibility for the consequential damages.

When I use the term consequential damages, I mean those damages which flow from some consequence or result of a breach of contract.

If you find that the foregoing propositions have been proved by ^[plaintiff], you shall award as additional damages:

[For lost profits as consequential damages insert the following:]

[The value of any net profits *[[and]* the present value of any future net profits] that it is reasonably certain *[plaintiff]* would have made if *[defendant]* had performed all of *[his][her][its]* *[promises][duties]* under the contract.]

[Insert the proper measure of any other consequential damages.]

[When I use the term net profits, I mean gross profit less variable or incremental costs saved by the breach.]

NOTE ON USE

Use this instruction with AMI 2442 when the plaintiff alleges consequential damages.

Insert the proper measure of consequential damages as permitted by law in the bracketed portion of the instruction. For lost profits as consequential damages in contract cases, the above measure of damage and definition of net profits may generally be used.

If the contract is governed by Article 2 of the Uniform Commercial Code, Ark. Code Ann. § 4-2-715, use AMI 2522.

COMMENT

The tacit agreement rule requires that before consequential damages may be recovered, the facts and circumstances in evidence must make it reasonable for the trier of fact to believe that the party, at the time of the contract, tacitly consented to be bound to more than ordinary damages in case of default on his part. *See Reynolds Health Care Servs., Inc. v. HMNH, Inc.*, 364 Ark. 168, 174–75, 217 S.W.3d 797, 804 (2005) (insufficient evidence of tacit agreement to be liable for consequential damages); *Bank of America, N.A. v. C.D. Smith Motor Co.*, 353 Ark. 228, 240–45 106 S.W.3d 425, 431–34 (2003) (sufficient evidence of tacit agreement to be liable for consequential damages); *Deck House, Inc. v. Link*, 98 Ark. App. 17, 25–28, 249 S.W.3d 817, 825–26 (2007) (insufficient evidence of tacit agreement to be liable for consequential damages).

Lost profits that flow from some consequence or result of a breach are consequential damages. *Boellner v. Clinical Studies Ctrs., LLC*, 2011 Ark. 83, at 14 (contract action); *Smith v. Walt Bennett Ford, Inc.*, 314 Ark. 591, 604–05, 864 S.W.2d 817, 825 (1993) (fraud action). The tacit agreement rule does not apply where lost profits are the natural and direct result of the breach, as such damages are considered general rather than consequential. *Acker Constr., LLC v. Tran*, 2012 Ark. App. 214, at 9–10; *K.C. Props. of N.W. Ark., Inc. v. Lowell Inv. Partners, LLC*, 373 Ark. 14, 24, 280 S.W.3d 1, 10 (2008); *Robertson v. Ceola*, 255 Ark. 703, 705–06, 501 S.W.2d 764, 767 (1973); *Deck House, Inc.*, 98 Ark. App. at 25, 249 S.W.3d at 825. In *Acker*, an owner of real estate entered

into one contract for the construction of four chicken houses and a separate contract with the same contractor for the construction of three additional houses. *Acker*, 2012 Ark. App. 214, at 1–2. The owner testified that the four houses were to be completed before the other three were to be started so that she could earn income from the four houses while the other three were being built. *Id.* at 9. The contractor built all seven houses at the same time, delaying completion of the first four. *Id.* at 9–10. The court held that the lost anticipated profits on the first four houses were the natural and direct result of, rather than a consequence of, the contractor's breach of the agreement to complete the first four houses before starting the other three. *Id.* at 9–11.

The determination of the loss of anticipated profits on a contract that was not performed because of the defendant's breach requires two steps. First, the trial court must determine whether it is reasonably certain that the plaintiff would have made any profits on the contract if it had been performed so that the jury is not left to speculate as to the existence of a loss of profits. A plaintiff is only entitled to recover lost profits when he can present a reasonably certain set of figures from which an accurate projection of lost profits can be made. Too many variables will render the projection speculative. Proof of an established business's past profits is generally sufficient proof that it would have made future profits. *Boellner*, 2011 Ark. 83 at 14–15; *Interstate Oil & Supply Co. v. Troutman Oil Co.*, 334 Ark. 1, 6–7, 972 S.W.2d 941, 943–44 (1998).

Second, the jury must determine the amount of any profits that it is reasonably certain the plaintiff would have made if the defendant had not breached the contract. *Boellner*, 2011 Ark. 83, at 14–15; *Smith*, 314 Ark. at 606. “[L]ess certainty is required to prove the amount of lost profits than is required to show that profits were lost.” *Tremco, Inc. v. Valley Aluminum Prods. Corp.*, 38 Ark. App. 143, 145, 831 S.W.2d 156, 158 (1992) (a case arising under the UCC); *Reed v. Williams*, 247 Ark. 314, 317, 445 S.W.2d 90, 91 (1969) (common law contract action). The amount of loss may be determined in any manner reasonable under the circumstances. The fact that a party can only state the amount of damages from approximate estimates will not preclude recovery if from the approximate estimates a satisfactory conclusion can be reached. *Boellner*, 2011 Ark. 83, at 15; *Interstate Oil*, 334 Ark. at 6–7, 972 S.W.2d at 944.

Only lost net profits, i.e., lost gross profits less variable or incremental costs saved by the breach, are recoverable. Fixed overhead expenses continue despite the breach and are not deducted in arriving at lost net profits. *Boellner*, 2011 Ark. 83, at 14–15; *Interstate Oil*, 334 Ark. at 7, 972 S.W.2d at 944.

Research References

West's Key Number Digest
Damages ⇨218

Legal Encyclopedias 411
C.J.S., Damages §§ 307 to 317, 432

PROMISSORY ESTOPPEL

AMI 2444

ISSUES—PROMISSORY ESTOPPEL

 claims damages against for promissory estoppel and has the burden of proving each of four essential propositions:

First, made a promise to ;
[defendant] [plaintiff]

Second, should reasonably have expected
[defendant]
 to [act in reliance on the promise] [refrain from
[plaintiff]
acting in reliance on the promise]; [and]

Third, [acted] [refrained from acting] in reasonable reliance on the promise to [his][her][its] detriment; [and]
[plaintiff]

[Fourth, injustice can be avoided only by enforcement of the promise.]

NOTE ON USE

This instruction should only be used if the court has decided that the claim of promissory estoppel should be submitted to the jury or the parties consent.

The fourth bracketed element should only be used if the court has decided that the question of avoidance of injustice should be submitted to the jury or the parties consent.

Insert the appropriate bracketed clause for the particular fact pattern presented.

For the damages instruction, modify AMI 2442.

COMMENT

This instruction was cited as correctly stating the law in Fairpark,

LLC v. Healthcare Essentials, Inc., 2011 Ark. App. 146, at 12, 381 S.W.3d 852, 859 (appeal from a decision of the circuit court sitting as the fact finder).

The Arkansas Supreme Court has not decided whether promissory estoppel is an appropriate claim to submit to a jury. Claims of promissory estoppel have been submitted to juries in several cases that reached the Arkansas appellate courts. Those cases do not, however, include any discussion of whether parties objected to the submission of claims of promissory estoppel to juries or of whether doing so was appropriate. In those cases, claims of promissory estoppel were submitted to juries along with other claims. *See, e.g.,* Mercy Health Sys. of Northwest Ark. v. McGraw, 2013 Ark. App. 459 (negligence, promissory estoppel, and breach of fiduciary duty claims submitted to jury); Superior Fed. Bank. v. Jones & Mackey Constr. Co., 84 Ark. App. 1, 8, 8 S.W.3d 324, 328 (2003); 93 Ark. App. 317, 319, 219 S.W.3d 643, 645 (2005) (breach of contract, promissory estoppel, and defamation submitted to the jury); S. Beach Beverage Co. v. Harris Brands, Inc., 355 Ark. 347, 352, 138 S.W.3d 102, 104–05 (2003) (claims of violation of the Franchise Practices Act and promissory estoppel submitted to the jury, and the verdict in favor of the plaintiff was affirmed under the Franchise Practices Act); Tyson Foods, Inc. v. Davis, 347 Ark. 566, 578, 66 S.W.3d 568, 576 (2002) (fraud, promissory estoppel, and negligence were submitted on a general verdict form, and the verdict for the plaintiff was treated as indivisible); Belin v. West, 315 Ark. 61, 64, 864 S.W.2d 838, 840 (1993) (defamation, promissory estoppel, and interference with business expectancy submitted to the jury); Dickson v. Delhi Seed Co., 26 Ark. App. 83, 92–93, 760 S.W.2d 382, 388 (1988) (claims of breach of oral agreement and promissory estoppel against the defense of statute of frauds were submitted to the jury); Ralston Purina Co. v. McCollum, 271 Ark. 840, 841–42, 611 S.W.2d 201, 202 (1981) (claims of breach of oral agreement and promissory estoppel against the defense of statute of frauds were submitted to the jury).

After the passage of Amendment 80 to the Arkansas Constitution, which merged the courts of law and equity, the Arkansas appellate courts have held that claims which are historically equitable in nature should not be submitted to a jury. *Nat'l Bank of Ark. v. River Crossing Partners, LLC*, 2011 Ark. 475, at 10, 385 S.W.3d 754, 761 (“a circuit court must review the historical nature of the claims to determine whether they should be submitted to a judge as equitable matters or to a jury as legal matters”); *Ludwig v. Bella Casa, LLC*, 2010 Ark. 435, at 9, 372 S.W.3d 792, 798 (holding that a nuisance claim for injunctive relief, which was traditionally tried in equity, should not have been submitted to the jury); *First Nat'l Bank of Dewitt v. Cruthis*, 360 Ark. 528, 533–34, 203 S.W.3d 88, 91–92 (2005) (Amendment 80 did not alter the issues that could be submitted to the jury). One commentator has described promissory estoppel as an equitable doctrine, which derived from equitable estoppel, also known as estoppel in pais, in order to prevent frauds and other injustices from promises of future conduct. HOWARD W. BRILL, ARKANSAS LAW OF DAMAGES § 17:14, at

54-57 & nn. 5-6 (5th ed. 2010-11 Supp.) (citing, among other sources, POMEROY'S EQUITY JURISPRUDENCE § 808b (5th ed. 1941)). *But see* Merex A.G. v. Fairchild Weston Systems, Inc., 29 F.3d 821, 824-26 (2nd Cir. 1994) (tracing promissory estoppel's historical roots to conventions in both law and equity).

In federal court, the right to jury trial is determined by the Seventh Amendment to the United States Constitution. Three U.S. Circuit Courts of Appeals have held that certain claims of promissory estoppel should not be submitted to the jury. In *Merex v. Fairchild*, the Second Circuit held that the appellant's claim of promissory estoppel in response to the defense of the statute of frauds "is properly regarded as equitable rather than legal and, consequently, [the appellant] was not entitled to a jury trial on its claim for promissory estoppel." 29 F.3d at 826. The court noted that this form of promissory estoppel is restated in the RESTATEMENT (SECOND) OF CONTRACTS § 139(1). The court implied, without deciding, that the Seventh Amendment conferred a right to jury trial on the form of promissory estoppel restated in the RESTATEMENT (SECOND) OF CONTRACTS § 90, which it described as detrimental reliance. *Id.* at 824-25. Likewise, in *InCompass IT, Inc. v. XO Communication Services, Inc.*, the Eighth Circuit, relying on *Merex v. Fairchild*, concluded that as the appellant was using promissory estoppel to avoid the statute of frauds, the promissory estoppel claim was equitable in nature. 719 F.3d 891. In addressing the nature of the remedy sought, the court recognized that while "[a] claim for money damages . . . constitutes 'legal' relief" which generally affords a right to a jury trial, "money awarded incidental to the grant of equitable relief [is] not legal in nature." Therefore, the appellant was not entitled to a jury trial as the appellant's claim as a whole was "undeniably equitable [in] nature." In *Nimrod Marketing (Overseas), Ltd. v. Texas Energy Investment Corp.*, the Fifth Circuit held that no right to jury trial attached under the Seventh Amendment to claims of promissory estoppel based on the plaintiff's detrimental reliance on comfort letters and verbal authorizations to acquire equipment and supplies for the defendant's construction project. 769 F.2d 1076, 1078-79 (5th Cir. 1985). The court reasoned: "Promissory estoppel is an equitable form of action in which equitable rights alone are recognized . . . Defendants had no right to trial by jury . . ." *Id.* at 1080.

The determination of the right to jury trial over particular claims and defenses is beyond the charge given the Committee by the Arkansas Supreme Court. The Committee therefore takes no position on the propriety of the submission of the claim of promissory estoppel to the jury in state or federal courts. The Committee has included this instruction in the AMI in the event that a trial court determines that the claim should be submitted to a jury, the parties consent to the submission of the claim to the jury, or the court empanels an advisory jury to decide the claim under Ark. R. Civ. P. 39(c). In order to preserve error in the submission of one of several claims to a jury, the claims should be submitted on interrogatories instead of a general verdict. *S. Beach*

Beverage Co., 355 Ark. at 352, 138 S.W.3d at 105; *Tyson Foods*, 347 Ark. at 578–79, 582, 66 S.W.3d at 575–76, 578.

This instruction is based on the RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981):

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

See *Van Dyke v. Glover*, 326 Ark. 736, 745, 934 S.W.2d 204, 209 (1996). See also, *K.C. Props. of N.W. Arkansas, Inc. v. Lowell Inv. Partners, LLC*, 373 Ark. 14, 30, 280 S.W.3d 1, 14 (2008).

“[T]he party asserting estoppel must prove it strictly, there must be certainty to every intent, the facts constituting it must not be taken by argument or inference, and nothing can be supplied by intendment.” *K.C. Props.*, 373 Ark. at 30, 280 S.W.3d at 14. See also *Ward v. Worthen Bank & Trust Co.*, 284 Ark. 355, 359–60, 681 S.W.2d 365, 368 (1985) (citing *Julian Martin, Inc. v. Ind. Refrigeration Lines, Inc.*, 262 Ark. 671, 560 S.W.2d 228 (1978)).

A party asserting estoppel must prove that in good faith he relied on some act or failure to act by the other party and, in reliance on that act, suffered some detriment. *Rigsby v. Rigsby*, 356 Ark. 311, 316–18, 149 S.W.3d 318, 322–23 (2004) (affirming chancery court’s award of one-half interest in real property, including mineral rights, where son made improvements to the real property because of father’s promises that the property would one day be his); *Regions Bank v. Wetzel*, 649 F.3d 831, 837 (8th Cir. 2011) (assignee of judgment against the debtor may not raise the detrimental reliance of his assignor to estop the claims of the debtor to trust income); *Mercy Health v. McGraw*, 2013 Ark. App. 459, 7–8 (clinic office manager’s oral promise to “take care of” malpractice complaint and summons was sufficiently specific to support doctor’s reasonable reliance).

Hoffus v. Maestri lists the following five factors that may be used to determine whether “injustice” has occurred:

- (a) the availability and adequacy of other remedies, particularly cancellation and restitution;
- (b) the definite and substantial character of the action or forbearance in relation to the remedy sought;
- (c) the extent to which the action or forbearance corroborates evidence of the making and terms of the promise or the making and terms are otherwise established by clear and convincing evidence;

(d) the reasonableness of the action or forbearance;

(e) the extent to which the action or forbearance was foreseeable by the promisor.

31 Ark. App. 13, 786 S.W.2d 846 (1990) (citing Restatement Second, Contracts § 139 (1979)).

Some jurisdictions that submit the claim of promissory estoppel to the jury do not submit the fourth element, the avoidance of "injustice" by enforcement of the promise. Those jurisdictions reason that the element of injustice presents a policy question for the court instead of a fact question for the jury. Mich. Civil Jury Instructions 130.01, cmt. ("Certainly the avoidance of injustice requirement of promissory estoppel is equitable in nature and presents a policy decision for the court, not a question of fact for the jury [W]hether injustice can be avoided only by enforcement of the promise is a question of law for the court and is not submissible to the jury."); 4 Minn. Prac. Jury Instructions Guides—Civil, CIVJIG 20.50, Use Note ("One element of a promissory estoppel claim is whether injustice can be avoided only by enforcing the promise. That issue is a question of law for the court."); Ohio Jury Instructions—Civil 501.31, cmt. ("The first three elements are questions of fact for the jury Whether injustice can be avoided only by enforcement of the promise is an issue of law for the judge."); Pavel Enter., Inc. v. A.S. Johnson Co., 342 Md. 143, 168, 674 A.2d 521, 534 (1996) ("Finally, as to the fourth *prima facie* element, the trial court, and not a jury, must determine that binding the [defendant] is necessary to prevent injustice."); Hoffman v. Red Owl Stores, Inc., 26 Wisc. 2d 683, 698, 133 N.W.2d 267, 275 (1965) ("[T]he [final] requirement, that the remedy can only be invoked where necessary to avoid injustice, is one that involves a policy decision by the court. Such a policy decision necessarily embraces an element of discretion."); D&S Coal Co., Inc. v. USX Corp., 678 F.Supp. 1318, 1320–21 (E.D. Tenn. 1988) ("The injustice requirement of promissory estoppel is an equitable consideration which must ultimately be determined by the Court, not the jury."). *But see* Haw. Civil Jury Instructions 15.12 (including as fifth element of the promissory estoppel instruction: "Injustice can be avoided only by enforcement of the promise"); Burton v. Gen. Motors Corp., No. 1:95-cv-1054-DFH-TAB, 2008 WL 3853329, at *12, *15 (S.D. Ind. Aug. 15, 2008) (including as a final element in a promissory estoppel jury instruction under federal common law under the LMRA that "plaintiff suffered a financial loss because [defendant] broke the promise, and an award of damages for breaking the promise is needed to avoid what would otherwise be an injustice").

The Committee takes no position on the propriety of the submission of the fourth element of promissory estoppel to the jury in state or federal courts.

The Restatement Second, Contracts § 90 (1981) states that the remedy for breach of a promise "may be limited as justice requires." The

comments to the Restatement expand on this potential limitation: “[R]elief may sometimes be limited to restitution or to damages or specific relief measured by the extent of the promisee’s reliance rather than by the terms of the promise.” *Id.* at cmt d. One commentator describes various Arkansas cases as awarding either expectation or reliance damages, depending on the facts and circumstances of each case. Eric Mills Holmes, *Restatement of Promissory Estoppel*, 32 Willamette L. Rev. 263, 316-21 (1996) (surveying Arkansas law of promissory estoppel). However, another commentator states that the remedy for promissory estoppel should be expectancy damages. HOWARD W. BRILL, ARKANSAS LAW OF DAMAGES § 17:14, at 55 (5th ed. 2010-11 Supp.) (“The recovery under a promissory estoppel claim should . . . be what the party would have received, or what he would have avoided, if the promises had been carried out.”). The Committee is not aware of any reported Arkansas case that directly addresses the measure of damages for promissory estoppel cases as a whole. *See, e.g., Country Corner Food & Drug, Inc. v. Reiss*, 22 Ark. App. 222, 225-28, 737 S.W.2d 672, 67-75 (1987) (affirming judgment for expectancy damages for breach of oral contract; estoppel was asserted by the plaintiff against the defense of the statute of frauds). Whether the court determines that the proper measure of damages for the claim of promissory estoppel in a particular case is expectation or reliance damages, it may modify AMI 2442 for use as the damage instruction.

Generally, the law will not permit recovery on the basis of promissory estoppel when the parties have made a specific contract on the same subject matter. *Glenn Mech., Inc. v. S. Ark. Reg’l Health Ctr., Inc.*, 101 Ark. App. 440, 445, 278 S.W.3d 583, 586-87 (2008) (an enforceable written contract prevented recovery on claims of promissory estoppel and unjust enrichment). For exceptions to this general rule, *see* AMI 2445, cmt.

Research References

West’s Key Number Digest
Estoppel ⇨120

Legal Encyclopedias
C.J.S., Estoppel and Waiver § 293

RESTITUTION

AMI 2445

ISSUES—UNJUST ENRICHMENT—RESTITUTION
IMPLIED IN FACT

 claims that has been unjustly
(Plaintiff) (defendant)
enriched to 's detriment and has the burden of
(plaintiff)
proving four essential elements:

First, that provided
(plaintiff) (describe the services, good, or money)
to , who received the benefit of such [services]
(defendant)
[goods] [or] [money];

Second, that the circumstances were such that
 reasonably expected to be paid the value of
(plaintiff)
such [services] [goods] [or] [money] by ;
(defendant)

Third, that was aware that was
(defendant) (plaintiff)
providing such [services] [goods] [or] [money] with
the expectation of being paid and accepted the [ser-
vices] [goods] [or] [money]; and

Fourth, the reasonable value of such [services]
[goods] [or] [money] received by the defendant.

*[One who is free from fault is not unjustly en-
riched merely because [he][she][it] has chosen to
exercise a legal or contractual right. One is not
unjustly enriched by receipt of that to which [he][s-
he][it] is legally entitled.]*

[If you find that the has proved each of
(plaintiff)
these propositions, then your verdict should be for

_____. If, however, _____ has failed to prove any one
(plaintiff) (plaintiff)
or more of these propositions, then your verdict
should be for _____.]
(defendant)

NOTE ON USE

Use this instruction when the claim corresponds to the common law action of quantum meruit (services had and received), quantum valebat (goods had and received), or money had and received, and the obligation to make restitution is implied from the conduct of the parties. Because the value of the benefit received by the defendant is the fourth element in this instruction, do not use AMI 2442 (expectancy damages for breach of contract) with this instruction.

Do not use this instruction when the obligation to make restitution is implied by law.

This instruction may be used in the alternative to AMI 2401 and 2404, which require the jury to find that all elements of a contract were agreed upon or implied from the conduct of the parties for the recovery of expectancy damages under AMI 2442, although a recovery may not be obtained on both claims.

Use the first bracketed paragraph when supported by the evidence.

Do not use the last bracketed paragraph if the case is submitted on interrogatories.

COMMENT

This instruction is based on *Dews v. Halliburton Indus., Inc.*, 288 Ark. 532, 536–37, 708 S.W.2d 67, 69 (1986) (describing the unjust enrichment claim); *Woodhaven v. Kennedy Sheet Metal Co.*, 304 Ark. 415, 417–18, 803 S.W.2d 508, 510–11 (1991) (discussing measure of damages in quantum meruit cases); *City of Damascus v. Bivens*, 291 Ark. 600, 603, 726 S.W.2d 677, 679 (1987) (“[T]he award is measured by the value of the benefit conferred on the party unjustly enriched.”). See also *Sparks Reg’l Med. Ctr. v. Blatt*, 55 Ark. App. 311, 316–17, 935 S.W.2d 304, 307 (1996) (describing the unjust enrichment claim); *Farmer v. Riddle*, 2011 Ark. App. 120, at 2–4 (describing the unjust enrichment claim).

This instruction was prompted by *First Nat’l Bank of Dewitt v. Cruthis*, wherein the court held that a claim for restitution under the principle of unjust enrichment may be tried by a circuit court at law to a jury under Amendment 80 to the Arkansas Constitution, where the

allegation corresponds to the common law action of assumpsit for money had and received. 360 Ark. 528, 535-37, 203 S.W.3d 88, 93-94 (2005) The supreme court in *Cruthis* further observed that the common law action for assumpsit is for the recovery for the non-performance of a simple contract, which may be express or implied. Therefore, the action is *ex contractu*. *Id.* 306 Ark. at 535, 203 S.W.3d at 93. Although unjust enrichment is an equitable claim, the court held that the claim may be heard by a jury because it derives from the contractual action of assumpsit. *Id.* at 536-37, 203 S.W.3d at 94. However, the court actually reversed the submission of the claim of unjust enrichment to the jury because an equitable lien was sought as an additional remedy for the claim. *Id.* 306 Ark. at 537, 203 S.W.3d at 94.

Few cases involving claims of unjust enrichment that were submitted to juries have reached the Arkansas appellate courts. In *Ark. Nat'l Bank v. Martin*, the supreme court affirmed a judgment on a jury verdict in favor of a plaintiff who sued the defendant bank to recover the amount of a check drawn on the plaintiff's out of state bank. 110 Ark. 578, 163 S.W. 795 (1914). The plaintiff had been induced to give his check through a "swindling device" of two men who operated a gaming house in Hot Springs where they received bets on fake horse races. The defendant bank accepted the check for payment, and before the check had cleared the defendant's correspondent bank, the plaintiff instructed the defendant in a telegram not to pay the check. The defendant ultimately paid the check despite the telegram. The supreme court stated, "[t]he question, whether the bank was put upon notice as to plaintiff's ownership [of the funds drawn in the check] was fairly submitted to the jury, and the verdict is conclusive on that question." *Id.* at 5-84, 163 S.W. at 7-97. The court based the defendant bank's liability to the plaintiff not upon any wrong done by it, "but upon an implied promise to account to plaintiff for his funds which the bank had in its possession." *Id.* at 589, 163 S.W. at 798.

Knowledge of circumstances from which an obligation to pay could be implied also resulted in the supreme court affirming a jury verdict against a defendant on a claim for unjust enrichment in *Fite v. Fite*, 233 Ark. 469, 345 S.W.2d 362 (1961). In *Fite*, the plaintiff had loaned her son \$7,500 to purchase a home in Little Rock. The son purchased the home and received title as a tenant by the entirety with his wife. A few months later, the son died. Title to the home passed to the son's widow outside of probate, and there were insufficient assets in the son's probate estate to repay his mother. The widow refused the mother's request for repayment, and the mother sued the widow, alleging that the advance of funds was a loan and that the widow knew of the mother's intent to make a loan when she accepted the funds and joined in the purchase of the house. *Id.* at 470-73, 345 S.W. 2d at 363-65. The court observed that while the principle of unjust enrichment was most frequently applied in courts of equity, it was also recognized in courts of law. The court described the claim as implying a promise to pay "only when under the circumstances and proof it would be the duty of the

defendant to make such as promise." *Id.* at 473–74, 345 S.W.2d at 365. The court then observed that the "vital question" for the jury was whether the defendant widow had knowledge of the source and purpose of the advance of the funds for the purchase of the home and that if she did "then she was undoubtedly obligated to repay." The supreme court held that the evidence supported the verdict against the defendant. *Id.* at 474, 476, 345 S.W.2d at 365–66. One Justice dissented, arguing that a promise to pay should not "be implied from bare knowledge, unaccompanied either by affirmative conduct or by inaction that is equivalent in the circumstances to affirmative conduct." *Id.* at 478, 345 S.W.2d at 367–68. The dissenting justice also cautioned against a "sweeping [jury] instruction" that would permit a verdict for the plaintiff because of her "unhappy predicament." *Id.* at 476, 345 S.W.2d at 367.

Arkansas law has long recognized that contracts may be formed by express agreement or by implied agreement, where the contract is implied from the course of dealing or actions of the parties. The two types of contract are not inconsistent, the elements of each are the same, and claims involving either may be submitted to a jury. *See K.C. Props. of N.W. Ark., Inc. v. Lowell Inv. Partners, LLC*, 373 Ark. 14, 28–29, 280 S.W.3d 1, 34 (2008); *Steed v. Busby*, 268 Ark. 1, 7, 593 S.W.2d 34, 38 (1980); AMI 2404 (instructing the jury that a contract may be implied from the parties' conduct and dealings). This instruction for the quasi-contractual claim of unjust enrichment is drafted for use in those instances when the obligation to make restitution may fairly be implied from the conduct of the parties but no agreement, express or implied, has been formed. The elements of the quasi-contractual claim for unjust enrichment when the obligation to make restitution is implied by law are discussed below under a separate heading.

The benefit for which the plaintiff seeks restitution may under some circumstance be provided indirectly from the plaintiff to the defendant. *See Frigillana v. Frigillana*, 266 Ark. 296, 307, 584 S.W.2d 30, 35 (1979) (no privity or express contract or agreement is required); *Smith v. Whitener*, 42 Ark. App. 225, 229, 856 S.W.2d 328, 329–30 (1993) (defendant was unjustly enriched because his mortgage was satisfied by creditor's liquidation of the plaintiff's collateral). Consequently, in cases involving an indirect benefit from the plaintiff, the first and third elements of this instruction should be modified. Additionally, restitution may be recovered for services performed in good faith although the services were not requested by the recipient. *See Dews v. Halliburton*, 288 Ark. at 537, 708 S.W.2d at 69. The value of the benefit conferred on the defendant is the reasonable value of the goods, services, or products furnished. *Woodhaven v. Kennedy Sheet Metal*, 304 Ark. at 417, 803 S.W.2d at 510. In *Farmer v. Riddle*, *supra*, the defendants argued that the plaintiff's improvements to their garage apartment had "no value to them." 2011 Ark. App. 120, at 5. The plaintiff had sold her home and paid \$62,085 for the conversion of the defendants' garage into an apartment in which plaintiff alleged she had been invited to live for the rest of her life. *Id.* at 2–3. The defendants' appraiser testified that the defendants' property had not been enhanced

by the improvements to the garage because zoning ordinances prohibited the rental of the garage as an apartment. The appellate court affirmed the trial court's award in quantum meruit of \$47,719, based on the value of the living space in the garage apartment, by square footage. *Id.* at 3-5. However, where neither party submits evidence regarding the amount by which the plaintiff's improvements enhanced the value of the defendant's property, the cost of the improvements is evidence of the enhanced value, and judgment in favor of the plaintiff may be entered for the costs expended. *Jones v. Bourassa*, 2011 Ark. App. 369, at 8 (daughter awarded judgment for \$29,108.46, which was the amount she advanced toward her father's cost of constructing a house in which the daughter alleged she was to live in return for moving from Texas to Arkansas to work in father's business).

Tortious or fraudulent conduct is not a condition to an unjust enrichment claim. *See Frigillana*, 266 Ark. at 306, 584 S.W.2d at 34 (1979) ("the question is: Did [defendant], to the detriment of someone else, obtain something of value to which he was not entitled"); *Smith v. Whitener*, 42 Ark. App. at 228, 856 S.W.2d at 330 ("Even an innocent party who has been unjustly enriched may be compelled to surrender the fruits to another more deserving party"). *But see* *Colonia Ins. Co. v. Associated Ins. Mgmt. Corp.*, 13 F. Supp. 2d 891, 900 (W.D. Ark. 1998) ("in the realm of unjust enrichment, the word 'unjust' means 'unlawful'").

The absence of culpability in a claim based on unjust enrichment limits the recovery of the plaintiff to the direct benefit to the defendant of the plaintiff's money or property. The law of restitution provides for the recovery of the defendant's profits and consequential gains from the money or property of the plaintiff, but the enhanced recovery is based on the equitable remedy of disgorgement. *See* Restatement (Third) of Restitution & Unjust Enrichment, ch. 5, topic 1, intro. note & §§ 40-44 (Tentative Draft No. 4, 2005). A conscious wrongdoer may be required to disgorge all gains, including consequential gains, which exceed the direct benefit of the money or property taken. *Id.* A right to jury trial, however, would not attach to the equitable remedy of disgorgement. A request for an equitable remedy may preclude a right to jury trial on the claim for unjust enrichment. *See Cruthis*, 360 Ark. at 537, 203 S.W.3d at 94 (recognizing the right to jury trial on a claim for money had and received but reversing the submission of the claim to the jury on the basis that an equitable lien was sought as an additional remedy for the claim).

A person who is free from fault cannot be held to be unjustly enriched merely because he has chosen to exercise a legal or contractual right. *Deutsche Bank Nat'l Trust Co. v. Austin*, 2011 Ark. App. 531, at 7. In this case, the appellee had purchased property from a couple who was indebted to the appellant bank, and the purchase contract specifically referenced the couple's deed of trust to the bank's predecessor. The appellee continued making improvements to the property even though he knew the couple was not paying their debt to the bank. The court

held that because the bank had a superior interest in title to the appellee's property, the bank was not unjustly enriched by repairs the appellee had made, and the bank could foreclose on the property without reimbursing the appellee. *Id.* A trial court may refuse "to award unjust enrichment for improvements that might have enhanced the property's value when the [claimant] ha[s] undertaken them at his own risk." *Id.* See also *Hatchell v. Wren*, 363 Ark. 107, 118, 211 S.W.3d 516, 522 (2005) (exercise of a legal right does not create unjust enrichment).

In general, the law does not imply a contract when the parties have made a specific one on the same subject matter. *Glenn Mech., Inc. v. S. Ark. Reg'l Health Ctr., Inc.*, 101 Ark. App. 440, 445, 278 S.W.3d 583, 587 (2008) (a written subcontract covered the dispute). However, this general rule is subject to several exceptions, including the rescission at law of the contract, the discharge of the contract by impossibility or frustration of purpose, the charge of an unlawful fee under the contract, mutual mistake of material fact, a disputed performance compelled under protest, and the existence of a contract that fails to address, or fully address, a subject so that the contract is too indefinite on the subject to be enforceable. See *Campbell v. Asbury Automotive, Inc.*, 2011 Ark. 157, at 21-24 (where the seller in a sale contract allegedly charged the buyer an unlawful fee, the claim of unjust enrichment should not have been dismissed as a matter of law); *QHG of Springdale, Inc. v. Archer*, 2009 Ark. App. 692, at 9-13 (a written contract did not preclude an implied claim for unjust enrichment because the written contract between a physician and hospital required "some call rotation" but did "not fully address rotating call" and provided "no yardstick for measuring the damages" where the physician was required to provide almost non-stop call coverage); *Friends of Children, Inc. v. Marcus*, 46 Ark. App. 57, 62, 876 S.W.2d 603, 606 (1994) (a written placement agreement for the adoption of a child did not preclude an implied claim for restitution of the adoption fee following the agreed dissolution of the interlocutory decree of adoption and return of the child to the adoption agency). A contingency fee agreement between an attorney and her client does not preclude the attorney who is discharged without cause from suing the client for recovery in quantum meruit. In fact, the recovery in quantum meruit of a reasonable fee for services, rather than a claim for damages for breach of contract, is the only common law remedy available to an attorney discharged without cause. *Emery Hughes Corp. v. Audrianna Grisham, P.A.*, 2011 Ark. 230, at 1-2 (stating that the statutory remedy provided in the attorney's lien statute, Ark. Code Ann. § 16-22-304, is also available to an attorney discharged without cause).

All legal and equitable grounds for retaining the goods, services, or money provided by the defendant may be asserted as a defense to a claim of unjust enrichment. *Whitley v. Irwin*, 250 Ark. 543, 551, 465 S.W.2d 906, 911 (1971) ("No recovery . . . can be based on unjust enrichment when the recipient can show a legal or equitable ground for keeping it."). See also *Merchants & Planters Bank & Trust Co. of Arkadelphia v. Massey*, 302 Ark. 421, 425, 790 S.W.2d 889, 891 (1990) (unclean hands successfully asserted as a defense to the claim).

Further development of Arkansas law regarding this claim is likely. The case law of other states already presents circumstances that may preclude an unjust enrichment instruction or require modification of this instruction or additional instructions. *See, e.g., Peerless Packing Co. v. Malone & Hyde, Inc.*, 376 S.E. 2d 161, 164 n.4 (W. Va. 1988) (holding that “absent truly egregious circumstances verging on actual fraud,” an unjust enrichment claim is not applicable in a case arising under Article 9 of the UCC); *Greer v. White Oak State Bank*, 673 S.W.2d 326 (Tex. App. 1984) (addressing non-exclusivity of the remedy in UCC § 4-212 against bank customer, whether defendant had materially changed position in reliance on payment, and whether jury should have been instructed to effect that unjust enrichment has not occurred when money is paid voluntarily with full knowledge of facts); *Ninth Dist. Prod. Credit Ass’n. v. Ed Duggan, Inc.*, 821 P.2d 788 (Colo. 1991) (considering availability of unjust enrichment claim brought by unsecured creditor in circumstances in which claim would upset priority of claims under UCC Article 9 by creditors holding perfected security interests).

Restitution Implied by Law

The quasi-contractual claim that is now known as unjust enrichment evolved for those exceptional circumstances when neither the law of contract nor the law of tort provided redress, but “in equity and good conscience” redress was required. *DAN B. DOBBS, LAW OF REMEDIES* § 4.1(1) at 370 (1993). In keeping with the equitable and remedial nature of this claim, the Arkansas courts have not necessarily limited the claim of unjust enrichment to those instances when an obligation to make restitution may be implied from the parties’ conduct. The Arkansas courts have implied in law an obligation to make restitution in the following additional contexts: void contract, impossibility of performance, legal rescission, failure of consideration, fiduciary relationship, confidential relationship, double recovery, duress, mistake of fact, deceit, extortion, and unlawful conduct. *See HOWARD W. BRILL, ARKANSAS LAW OF DAMAGES* § 31:2 at 568–69 (5th ed. 2004). In these contexts, the obligation to make restitution is created by law without regard to implied assent of the parties on the ground that restitution is “dictated by reason and justice.” *Sparks Reg’l Med. Ctr.*, 55 Ark. App. at 316, 935 S.W.2d at 307 (the obligation to make restitution rests “on the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another”); *Dews*, 288 Ark. at 536, 708 S.W.2d at 69 (“Quasi-contracts . . . are legal fictions, created by the law to do justice.”); *Friends of Children*, 46 Ark. App. at 63, 876 S.W.2d at 606 (“the implied-in-law contract, or quasi-contract, is indeed no contract at all; it is simply a rule of law that requires restitution to the plaintiff”).

The elements of a claim for unjust enrichment that is implied by law may differ from the elements of the claim that is implied from the parties’ conduct. The common elements of the claim implied by law, as they appear in the cases arising from chancery courts that involve one of the predicate contexts, such as void contract, impossibility of performance, duress, mistake of fact, deceit, etc., are:

That Defendant received [money][or][the equivalent of money] to which [he][she][it] was not entitled and which should be restored;

That there was some operative act, intent, or situation that made the enrichment of Defendant unjust and inequitable;

That the unjust enrichment of Defendant was at the expense of [to the detriment of] Plaintiff; and

The amount by which Defendant was unjustly enriched.

See *Hatchell v. Wren*, 363 Ark. 107, 117, 211 S.W.3d 516, 522 (2005) (summarizing the law of several cases arising from chancery courts); *Guar. Nat'l Ins. Co. v. Denver Roller, Inc.*, 313 Ark. 128, 138, 854 S.W.2d 312, 317 (1993) (declaratory judgment action arising in chancery court).

Guidance as to the specific elements of claims of unjust enrichment that are implied by law is lacking in Arkansas jurisprudence. The submission of an instruction that requests the jury to determine whether enrichment of a defendant is “unjust and inequitable” seems to contravene the admonition of one learned Justice against “sweeping” instructions that allow a jury to award restitution for anyone in an “unhappy predicament.” See *Fite*, 233 Ark. at 477, 345 S.W.2d at 367 (Smith, J., dissenting). A similar concern has prompted a proposal that the elements of unjust enrichment claims be drawn from, and limited to, the categories of circumstances for which unjust enrichment is recognized in the RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT. See John C. Calhoun, Jr., & William A. Waddell, Jr., *Unjust Enrichment: A Suggested Approach for Instructing Juries in Claims at Law*, THE ARKANSAS LAWYER Fall 2008, at 10, 11. (“the failure to identify essential elements for the jury to consider, can result in a restitution claim being decided on nothing more than a particular jury panel’s view of what is ‘unjust’ or what it views as ‘equity and good conscience’”). For a discussion of the right to jury trial for the claim of promissory estoppel, which includes a similar “injustice” element, see AMI 2444, Comment.

The Committee awaits guidance from the courts regarding the categories of unjust enrichment claims to be submitted to juries, as well as the elements of those claims, before drafting additional instructions in this area.

CHAPTER 25

UCC SALES CONTRACTS

Table of Instructions

AMI

- 2501. Issues—UCC Sales Contract Formation.
- 2502. No Dispute as to Existence of Contract.
- 2503. Offer and Acceptance.
- 2504. Lapse of Offer.
- 2505. Additional Terms in Acceptance or Confirmation.
- 2506. Definition—Merchant.
- 2507. Issues—Breach of UCC Warranty.
- 2508. Express Warranties.
- 2509. Implied Warranty of Merchantability.
- 2510. Implied Warranty from Course of Dealing or Usage of Trade.
- 2511. Course of Dealing, Usage of Trade, Course of Performance.
- 2512. Implied Warranty of Title and Against Infringements.
- 2513. Implied Warranty of Fitness for a Particular Purpose.
- 2514. Defense—Exclusion or Modification of Implied Warranties.
- 2515. Buyer's Rights on Improper Delivery.
- 2516. Issues—Rejection of Goods.
- 2517. Acceptance of Goods.
- 2518. Issues—Revocation of Acceptance.
- 2519. Buyer's Damages for Non-Delivery, Rejection or Revocation.
- 2520. Buyer's Damages for Accepted Goods—Breach of Warranty.
- 2521. Buyer's Incidental Damages.
- 2522. Buyer's Consequential Damages.
- 2523. Seller's Remedies.
- 2524. Seller's Damages—Buyer's Non-Acceptance or Repudiation.
- 2525. Seller's Damages—Action for the Price.
- 2526. Seller's Damages After Resale of Goods.
- 2527. Seller's Incidental Damages.
- 2528. Damages—Proof of Market Price.
- 2529. Limitation or Modification of Remedies for Breach of Warranty.

AMI 2501

ISSUES—UCC SALES CONTRACT FORMATION

To establish a contract for the sale of goods, has the burden of proving each of three essential propositions:
(plaintiff)

First, that one party agreed to a present or future sale of goods to a second party;

Second, that the second party agreed to the sale of goods; and

Third, that the parties intended to make a contract.

A contract for the sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.

[An agreement sufficient to constitute a contract for the sale of goods may be found even though the moment of its making is undetermined.]

[Even though one or more terms are left open, a contract for the sale of goods does not fail for indefiniteness if the parties have intended to make a contract.]

[Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for the sale of goods although the writings of the parties do not otherwise establish a contract. In such case the terms of the contract consist of those terms on which the writings of the parties agree, together with any supplementary terms as instructed by the court.]

NOTE ON USE

If there is no dispute as to the existence of a contract for the sale of goods between the parties, use AMI 2502. Use the bracketed paragraphs when warranted by the evidence. In an appropriate case, one or more of the bracketed paragraphs may be used for transition to specific instructions covering “gap fillers” under Article 2, Part 3 of the UCC.

If there is an issue of fact as to whether the contract is for the sale of “goods,” an instruction which states the definition of “goods” as found in Ark. Code Ann. § 4-2-105 should be used with this instruction.

In most cases, the Committee anticipates that the court will determine whether “there is a reasonably certain basis for giving a remedy.” See Ark. Code Ann. § 4-2-204(3). If the court determines that there is an issue of fact on this point, the instruction should be modified.

COMMENT

This instruction is based on Ark. Code Ann. §§ 4-2-106(1), 4-2-204 and 4-2-207(3). A claim for breach of warranty under the Uniform Commercial Code is dependent upon an enforceable contract for the sale of goods. See Ark. Code Ann. §§ 4-2-312, 4-2-313, 4-2-314, 4-2-315. This instruction provides the essential elements of such a contract. However, a case may contain other issues which must also be decided to determine whether the parties have an enforceable contract. While some of those issues are included in the instructions in this chapter, others are not because they do not occur frequently. If additional instructions are required on such issues, they should be prepared by the practitioner.

In addition to the intent to make a contract, Ark. Code Ann. § 4-2-204(3) requires that there be “a reasonably certain basis for giving a remedy” for its breach, termination or cancellation. As indicated in the Note on Use, it is anticipated by the Committee that the court will usually make the threshold determination of that issue as a matter of law.

In most cases the trial court will make the initial determination whether the contract constitutes a transaction in “goods.” *Mason v. Jackson*, 323 Ark. 252, 914 S.W.2d 728 (1996). However, it is conceivable that the issue may be a question of fact for the jury. *DeGroft v. Lancaster Silo Co., Inc.*, 72 Md. App. 154, 527 A.2d 1316 (1987).

Research References

West's Key Number Digest
Sales §2845

Legal Encyclopedias
C.J.S., Sales §§ 571, 583, 593, 599, 621

AMI 2502

NO DISPUTE AS TO EXISTENCE OF CONTRACT

[The parties do not dispute that they] [The parties in this case] entered into a contract for the sale of goods.

NOTE ON USE

Use this instruction when the parties do not dispute the existence of the sales contract underlying the cause of action or when the court has made that determination as a matter of law.

If this instruction is used, do not use AMI 2501, 2503, 2504, 2505 and 2506.

Research References

West's Key Number Digest
Sales ¶2845

Legal Encyclopedias
C.J.S., Sales §§ 571, 583, 593, 599, 621

AMI 2503

OFFER AND ACCEPTANCE

Unless otherwise unambiguously indicated by the language or circumstances, [an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances] [an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or nonconforming goods (, but such a shipment of nonconforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer)].

[An action is taken seasonably when it is taken at or within the time agreed, or if no time is agreed, at or within a reasonable time.]

NOTE ON USE

Use this instruction with AMI 2501 when offer and acceptance are issues. Insert the appropriate bracketed phrases in the first paragraph as warranted by the evidence.

Use the bracketed paragraph when there is an issue of fact as to whether the seller "seasonably" notified the buyer that the shipment was offered only as an accommodation to the buyer.

COMMENT

This instruction is based on Ark. Code Ann. §§ 4-1-205(b) and 4-2-206(1).

Research References

West's Key Number Digest
Sales ⇨2846

Legal Encyclopedias
C.J.S., Sales §§ 571, 583, 593, 599, 621

AMI 2504

LAPSE OF OFFER

Where beginning a requested performance is a reasonable mode of acceptance, an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.

NOTE ON USE

Use this instruction when there is an issue as to whether the offer lapsed after performance began.

COMMENT

This instruction is based on Ark. Code Ann. § 4-2-206(2). If a case involves a firm offer by a merchant to buy or sell goods which gives assurance that it will be held open, this instruction should be modified in accordance with Ark. Code Ann. § 4-2-205.

Research References

West's Key Number Digest

Sales ◊2846

Legal Encyclopedias

C.J.S., Sales §§ 571, 583, 593, 599, 621

AMI 2505

ADDITIONAL TERMS IN ACCEPTANCE OR
CONFIRMATION

[A definite and seasonable expression of acceptance] [or] [a written confirmation which is sent within a reasonable time] operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

The additional terms are to be construed as proposals for addition to the contract. *[(Between merchants) such terms become part of the contract unless (the offer expressly limits acceptance to the terms of the offer) (they materially alter it) (or) (notification of objection to them has already been given or is given within a reasonable time after notice of them is received)]*.

[An action is taken seasonably when it is taken at or within the time agreed or if no time is agreed at or within a reasonable time.]

NOTE ON USE

Use this instruction when the acceptance or confirmation states additional or different terms.

Use the last bracketed paragraph when the first bracketed phrase of the first paragraph is used and the court believes the definition of "reasonable" would be helpful to the jury.

If the parties are merchants, use the appropriate portion(s) of the bracketed sentence in the second paragraph. If there is an issue of fact as to whether the parties are merchants, use the bracketed language "Between merchants" and also use AMI 2506.

COMMENT

This instruction is based on Ark. Code Ann. §§ 4-1-205(b) and 4-2-207(1), (2).

Research References

West's Key Number Digest

Sales ◉2846

Legal Encyclopedias

C.J.S., Sales §§ 571, 583, 593, 599, 621

AMI 2506

DEFINITION—MERCHANT

When I use the word “merchant” in these instructions, I mean a person

[who deals in goods of the kind involved in this transaction] [or]

[who (otherwise) by [his][her] occupation, holds [himself][herself] out as having knowledge or skill peculiar to the practices or goods involved in the transaction] [or]

[to whom knowledge or skill peculiar to the practices or goods involved in the transaction may be attributed by [his][her] employment of an agent or broker or other intermediary who, by [his][her] occupation, holds [himself][herself] out as having such knowledge or skill].

NOTE ON USE

Use this instruction with any instruction that includes the word “merchant” where the status of a party as a merchant is an issue. Use the bracketed clauses as warranted by the evidence.

COMMENT

This instruction is based on Ark. Code Ann. § 4-2-104(1).

Research References

West's Key Number Digest
Sales Ⓒ2843

Legal Encyclopedias
C.J.S., Sales §§ 571, 583, 593, 599, 621

AMI 2507

ISSUES—BREACH OF UCC WARRANTY

 claims damages from for breach of
(Plaintiff) (defendant)
warranty and has the burden of proving each of
(number)
essential propositions:

First, that [he][she][it] sustained damages;

[(Second), that and entered into a
(plaintiff) (defendant)
contract for the sale of goods;]

[Second] [Third], that there [was] [were] [an] [ex-
press] [and] [or] [implied] warranty[ies] from
(defendant)
to ;
(plaintiff)

[(Third) (Fourth), that did what the parties'
(plaintiff)
contract required of [him][her][it] to claim the war-
ranty(ies)];

[Fourth] [Fifth], that the goods failed to conform
to the warranty(ies); [and]

[(Fifth) (Sixth), that the failure to conform proxi-
mately caused 's damages;] [and]
(plaintiff)

[(Sixth) (Seventh), that gave notice of the
(plaintiff)
failure of the goods to conform to the warranty to
within a reasonable time;] [and]
(defendant)

**[(Seventh) (Eighth), that _____ was a person
(plaintiff)
whom _____ might reasonably expect to (use) (con-
(defendant)
sume) (or) (be affected by) the product.]**

**[If you find that _____ has proved each of these
(plaintiff)
propositions, then your verdict should be for _____.
(plaintiff)
If, however, _____ has failed to prove any one or more
(plaintiff)
of these propositions, then your verdict should be for
_____.]
(defendant)**

NOTE ON USE

If there is no dispute that the parties entered into a contract for the sale of goods, do not use the bracketed second element.

If there is no dispute that the plaintiff did what the contract required of him to claim the warranty, do not use the bracketed fourth element.

If there is no issue of fact as to causation because the standard measure of damages stated in Ark. Code Ann. § 4-2-714(2) is the only element of damage, do not use the bracketed sixth element.

If there is no issue of fact as to whether notice of the breach was given to the defendant, do not use the bracketed seventh element. If there is an issue as to the adequacy of the notice, an additional instruction may be appropriate.

Use the bracketed eighth element if the plaintiff is not the purchaser of the product.

The final bracketed paragraph of the instruction should not be given if the case is submitted on interrogatories or if there is an affirmative defense such as a disclaimer of warranties.

For products liability cases, see AMI 1010 to 1013.

COMMENT

This instruction is based on Ark. Code Ann. §§ 4-2-313, 4-2-314, 4-2-315 and 4-2-318. See also *Great Dane Trailer Sales, Inc. v. Malvern*

Pulpwood, Inc., 301 Ark. 436, 785 S.W.2d 13 (1990); E.I. Du Pont de Nemours and Co. v. Dillaha, 280 Ark. 477, 659 S.W.2d 756 (1983); and F.L. Davis Builders Supply, Inc. v. Knapp, 42 Ark. App. 52, 59, 853 S.W.2d 288, 291 (1993), all of which reference elements of these claims.

Ark. Code Ann. § 4-2-607(3)(a) requires a buyer to give the seller notice of the breach within a reasonable time. Giving of notice is a condition precedent to recovery which must be alleged and proved. *Williams v. Mozark Fire Extinguisher Co.*, 318 Ark. 792, 888 S.W.2d 303 (1994); *L. A. Green Seed Co. of Ark. v. Williams*, 246 Ark. 463, 469, 438 S.W.2d 717, 720 (1969); *Industrial Electronic Supply, Inc. v. Lytle Mfg., L.L.C.*, 94 Ark. App. 81, 226 S.W.3d 1 (2006); *Adams v. Wacaster Oil Co., Inc.*, 81 Ark. App. 150, 98 S.W.3d 832 (2003). Where some notice is given but there is an issue regarding the sufficiency or timeliness of the notice, this is ordinarily a question of fact to be resolved by the factfinder. *Greenfield Seed Co. v. Bland*, 18 Ark. App. 48, 710 S.W.2d 833 (1986), citing *L. A. Green Seed Co. of Ark.*, *supra*, and its reference to Comment 4 to Ark. Code Ann. § 4-2-607; *Industrial Electronic Supply, Inc.*, *supra*. However, where the evidence is such that it can lead reasonable minds to only one conclusion as to the sufficiency of notice, it becomes a question of law to be resolved by the court. *Cotner v. International Harvester Co.*, 260 Ark. 885, 889, 545 S.W.2d 627, 630 (1977). The filing of a complaint itself does not constitute adequate notice. *Williams*, *supra*; *Cotner*, *supra*. General notice of an alleged defect is not enough; the notice must be sufficient to put the seller on notice that the buyer is looking to it for damages for the alleged breach of warranty. *Cotner*, *supra*.

In *Cinnamon Valley Resort v. EMAC Enterprises, Inc.*, 89 Ark. App. 236, 202 S.W.3d 1 (2005), the Court of Appeals stated that it was not error to give a modified version of this instruction in a non-UCC construction warranty case where accompanied by a more specific instruction covering the common law regarding the notice issue there involved. For instructions regarding warranties in construction cases, see AMI 1205 to 1207.

Research References

West's Key Number Digest, Sales
Sales ⇨2869 to 2871

Legal Encyclopedias
C.J.S., Sales §§ 512 to 517

AMI 2508

EXPRESS WARRANTIES

Express warranties are created by a seller as follows:

[Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.]

[Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.]

[Any sample or model which is made part of the basis of the bargain creates an express warranty that the (*whole of the*) goods shall conform to the sample or model.]

[It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that [he][she] have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.]

[When the buyer is not influenced by a (*statement*) (*description*) (*sample*) (*model*) in making the purchase, the (*statement*) (*description*) (*sample*) (*model*) is not a basis of the bargain.]

NOTE ON USE

Use this instruction when the plaintiff claims breach of an express warranty. Use the bracketed paragraphs as warranted by the evidence.

COMMENT

This instruction is based on Ark. Code Ann. § 4-2-313.

Where a buyer is not influenced by a statement in making a purchase, the statement is not a basis of the bargain. *Ciba-Geigy Corp. v. Alter*, 309 Ark. 426, 834 S.W.2d 136 (1992). A statement that a product is safe can be considered an affirmation of fact sufficient to constitute an express warranty. *Id.* If an express warranty is inconsistent with an attempted exclusion of a warranty, a jury may conclude that the exclusion is ineffective. *Id.*; Ark. Code Ann. § 4-2-316(1).

Research References

West's Key Number Digest

Sales ◊2870

Legal Encyclopedias

C.J.S., Sales §§ 512 to 517

AMI 2509

IMPLIED WARRANTY OF MERCHANTABILITY

[Unless excluded or modified,] a warranty that the goods shall be merchantable is implied in a contract for their sale [if the seller is a merchant with respect to goods of that kind.]

To be merchantable, goods must be at least such as are fit for the ordinary purposes for which they are used [and:]

[Pass without objection in the trade under the contract description;] [and]

[In the case of fungible goods, are of fair average quality within the description;] [and]

[Run, within the variations permitted by the agreement, of even kind, quality, and quantity within each unit and among all units involved;] [and]

[Are adequately contained, packaged, and labeled as the agreement may require;] [and]

[Conform to the promises or affirmations of fact made on the container or label if any.]

[“Fungible goods” are *(either)* goods of which any unit is, by nature or usage of trade, the equivalent of any other like unit *(or)* *(goods that are treated as equivalent by agreement.)*]

NOTE ON USE

Use this instruction when the plaintiff claims the contract included an implied warranty of merchantability. Use the first bracketed phrase if there is an issue of exclusion or modification of the warranty and also use AMI 2514. Use the bracketed language at the end of the first

paragraph if there is an issue of fact as to whether the defendant is a merchant and also use AMI 2506 with this instruction. Use the remaining bracketed paragraphs as warranted by the evidence.

COMMENT

This instruction is based on Ark. Code Ann. §§ 4-2-314(1), (2) and 4-1-201(18). See *F.L. Davis Builders Supply, Inc. v. Knapp*, 42 Ark. App. 52, 59, 853 S.W.2d 288, 291 (1993) (affirming a verdict based on breach of the implied warranty of merchantability in favor of a poultry grower against the manufacturer and seller of foam insulation board used in the construction of chicken houses whose foil facers fell off, reducing the insulating quality of the board).

Research References

West's Key Number Digest
Sales ◊2871

Legal Encyclopedias
C.J.S., Sales §§ 512 to 517

AMI 2510

**IMPLIED WARRANTY FROM COURSE OF DEALING
OR USAGE OF TRADE**

[Unless excluded or modified,] an implied warranty may arise from the parties' *[course of dealing]* *[or]* *[usage of trade]*.

NOTE ON USE

Use this instruction when the plaintiff claims that an implied warranty was created by the parties' course of dealing or usage of trade.

Use the first bracketed phrase if there is an issue of exclusion or modification of the warranty and also use AMI 2514. Use the remaining bracketed phrases as appropriate.

COMMENT

This instruction is based on Ark. Code Ann. § 4-2-314(3).

Research References

West's Key Number Digest
Sales ◊2871

Legal Encyclopedias
C.J.S., Sales §§ 512 to 517

AMI 2511

COURSE OF DEALING, USAGE OF TRADE, COURSE OF PERFORMANCE

["Course of performance" means a sequence of conduct between the parties to a particular transaction that exists if the agreement of the parties with respect to the transaction involves repeated occasions for performance by a party and the other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection.]

["Course of dealing" means a sequence of conduct concerning previous transactions between the parties to a particular transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.]

["Usage of trade" means any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question.]

[A course of performance or course of dealing between parties or usage of trade in the vocation or trade in which they are engaged or which they are or should be aware is relevant in ascertaining the meaning of the parties' agreement, and may supplement or qualify the terms of the agreement. A usage of trade applicable in the place in which part of the performance under the agreement is to occur may be so utilized as to that part of the performance.]

[The express terms of an agreement and any applicable course of performance, course of dealing, or

usage of trade must be construed whenever reasonable as consistent with each other. If such a construction is unreasonable, (a) express terms prevail over course of performance, course of dealing, and usage of trade; (b) course of performance prevails over course of dealing and usage of trade; and (c) course of dealing prevails over usage of trade.]

NOTE ON USE

Use the appropriate portions of this instruction when one or more of the terms defined in the instruction appear in another instruction or otherwise as warranted by the evidence.

COMMENT

This instruction is based on Ark. Code Ann. § 4-1-303.

The existence and scope of usage of the trade must be proved as facts. *Id.* § 4-1-303(c). If it is established that such a usage is embodied in a trade code or similar record, the interpretation of the record is a question of law. *Id.* Evidence of a relevant usage of trade offered by one party is not admissible unless that party has given the other party notice that the court finds sufficient to prevent unfair surprise to the other party. *Id.* § 4-1-303(g).

Subject to the provisions of Ark. Code Ann. § 4-2-209 concerning modification and waiver, course of performance is relevant to show a waiver or modification of any term inconsistent with such course of performance. *Id.* § 4-1-303(f).

Course of performance, course of dealing and usage of trade evidence is admissible to explain or supplement, but not to contradict, a written contract intended to be a final expression of the parties' agreement, and to show modifications made after a contract. *Id.* § 4-2-202(a); see also *L.F. Brands Mktg., Inc. v. Dillard's, Inc.*, 2009 Ark. App. 174, 314 S.W.3d 736. There is no requirement that the contract be declared ambiguous before such evidence is admissible. See *L.F. Brands Mktg., Inc.*, *supra*.

When a contract does not contain non-waiver and no-unwritten-modification clauses and a course of performance in accepting late payments from the debtor is established, the creditor waives its right to insist on strict compliance with the contract and must give notice to the debtor that it will no longer accept late payments before it can declare default of the debt. However, if a contract includes non-waiver and no-

unwritten-modification clauses, the creditor, in accepting late payments, does not waive its right under the contract to declare default of the debt, and need not give notice that it will enforce that right in the event of future late payments. See *Minor v. Chase Auto Finance Corp.*, 2010 Ark. 246, 372 S.W.3d 762.

Research References

West's Key Number Digest

Sales — 2852, 2854

Legal Encyclopedias

C.J.S., Sales §§ 571, 583, 593, 599, 621

AMI 2512

**IMPLIED WARRANTY OF TITLE AND AGAINST
INFRINGEMENTS**

[Unless excluded or modified,] there is in a contract for sale a warranty by the seller that *[the title conveyed shall be good, and its transfer rightful] [and] [the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge].*

[The warranty can only be excluded or modified by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in [himself][herself][itself] or that [he] [she][it] is purporting to sell only such right or title as [he][she][it] or a third person may have.]

[Unless otherwise agreed a seller who is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of the rightful claim of any third person by way of infringement or the like, but a buyer who furnishes specifications to the seller must hold the seller harmless against any such claim which arises out of compliance with the specifications.]

NOTE ON USE

Use this instruction when the plaintiff claims a breach of the warranty of title or against infringements. Use the first bracketed phrase if there is an issue of exclusion or modification of the warranty and also use AMI 2514. Use the other bracketed paragraphs as warranted by the evidence.

COMMENT

This instruction is based on Ark. Code Ann. § 4-2-312.

It is not necessary to prove that the goods are stolen in order to es-

tablish a breach of this warranty. *Smith v. Russ*, 70 Ark. App. 23, 13 S.W.3d 920 (2000) (car dealer was unable to provide purchaser with a certificate of title to the vehicle sold, nor could purchaser obtain a title).

A person who holds himself out as the owner to the buyer may be liable for breach of this warranty. *Fields v. Sugar*, 251 Ark. 1062, 476 S.W.2d 814 (1972).

Research References

West's Key Number Digest
Sales ⅈ2871

Legal Encyclopedias
C.J.S., Sales §§ 512 to 517

AMI 2513

IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE

[Unless excluded or modified,] where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is an implied warranty that the goods shall be fit for such purpose.

NOTE ON USE

Use this instruction when the plaintiff claims that the parties' contract contains an implied warranty of fitness for a particular purpose.

Use the bracketed phrase if there is an issue of exclusion or modification of warranty and also use AMI 2514.

COMMENT

This instruction is based on Ark. Code Ann. § 4-2-315.

If the particular purpose for which goods are to be used coincides with their general functional use, the implied warranty of fitness for a particular purpose merges with the implied warranty of merchantability. *Great Dane Trailer Sales, Inc. v. Pryrock*, 301 Ark. 436, 785 S.W.2d 13, 16 (1990); *F.L. Davis Builders Supply, Inc. v. Knapp*, 42 Ark. App. 52, 60, 853 S.W.2d 288, 291 (1993).

Research References

West's Key Number Digest
Sales ⇨2871

Legal Encyclopedias
C.J.S., Sales §§ 512 to 517

AMI 2514

**DEFENSE—EXCLUSION OR MODIFICATION OF
IMPLIED WARRANTIES**

_____ contends that the implied warranty(ies) of
(Defendant)

_____ *[was] [were] [modified]*
(specify the implied warranties in question)
[excluded] and has the burden of proving:

[that the buyer before entering into the contract
(*examined the goods or the sample or model as fully
as the buyer desired*) (or) (*refused to examine the
goods*), and an examination ought in the circum-
stances to have revealed the defect to the buyer]; or

[that the warranty was (*excluded*) (*modified*) by
the (*parties' course of dealing*), (*course of perfor-
mance*) (or) (*usage of trade*)].

NOTE ON USE

Use this instruction when the defendant asserts the exclusion or modification of an implied warranty due to the buyer's opportunity to examine the goods or a sample or model, or due to course of dealing, course of performance or usage of trade. Use the appropriate bracketed phrases as warranted by the evidence. In the event a particular case presents other issues related to the defense of exclusion or modification of implied warranties (e.g., the timing of a disclaimer), this instruction should be modified.

COMMENT

This instruction is based on Ark. Code Ann. § 4-2-316(3)(b), (c).

Whether a disclaimer is conspicuous as required by Ark. Code Ann. § 4-2-316(2) is to be determined by the court. Ark. Code Ann. § 4-1-201(10). It is anticipated that the other provisions of § 4-2-316 will not present issues for the jury in most cases. For example, § 4-2-316(2) provides that "language to exclude all implied warranties of fitness is sufficient if it states . . . that 'There are no warranties which extend beyond the description on the face hereof.'" Likewise, § 4-2-316(3) states "[u]nless the circumstances indicate otherwise, all implied warranties

are excluded by expressions like 'as is,' 'with all faults' or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty."

For a discussion of the distinction between the exclusion or modification of warranties and the limitation of remedies, see *Jackson v. Swift-Eckrich*, 830 F. Supp. 486, 493-494 (W.D. Ark. 1993) and *Caterpillar Tractor Co. v. Waterson*, 13 Ark. App. 77, 679 S.W.2d 814 (1984).

If an alleged express warranty is inconsistent with an attempted exclusion of a warranty, a jury may conclude that the exclusion is ineffective. Ark. Code Ann. § 4-2-316(1); *Ciba-Geigy Corp. v. Alter*, 309 Ark. 426, 834 S.W.2d 136 (1992). If that situation is presented by the facts in the case, a separate instruction may be required.

Research References

West's Key Number Digest
Sales ◊2872

Legal Encyclopedias
C.J.S., Sales §§ 512 to 517

AMI 2515

BUYER'S RIGHTS ON IMPROPER DELIVERY

If the goods that are the subject of the contract *[or the delivery of the goods]* fail in any respect to conform to the contract, a buyer may:

[(1) reject the goods, and pursue a claim for damages;]

[(2) obtain substitute goods, and pursue a claim for damages;]

[(3) accept the non-conforming goods, and pursue a claim for damages.]

NOTE ON USE

This instruction should be given as a lead-in or transitional instruction in most cases involving non-conforming goods, or the tender of delivery of goods, to give the jury some context in which to understand the issues. Use the bracketed subsection(s) as warranted by the evidence.

COMMENT

This instruction is based on Ark. Code Ann. § 4-2-601.

Research References

West's Key Number Digest
Sales ◊2854

Legal Encyclopedias
C.J.S., Sales §§ 599, 621

AMI 2516

ISSUES—REJECTION OF GOODS

 contends that [he][she][it] properly rejected
(Buyer)
the goods that are the subject of the contract with
 , and has the burden of proving each of the fol-
(seller)
lowing essential propositions:
(number)

First, that the goods failed to conform to the contract;

[Second, that _____ did not accept _____ as
(buyer) (the goods)
explained in these instructions;]

[Second,] [Third,] that _____ provided notice to
(buyer)
of [his][hers][its] rejection; and
(seller)

[Third,] [Fourth,] that the notice of rejection was seasonably given by to .
(buyer) (seller)

NOTE ON USE

Use this instruction when there is an issue of whether a buyer properly rejected goods. Use the first bracketed paragraph and AMI 2517 if there is a fact question of whether the buyer accepted the goods and thereby precluded the right of rejection.

The definition of "seasonable" is provided as a part of AMI 2503, and may be used in connection with this instruction.

COMMENT

This instruction is based on Ark. Code Ann. § 4-2-602, which deals with the manner and effect of rightful rejection in all cases except installment cases. Installment cases, which are governed by Ark. Code Ann. § 4-2-612, may require some modification of this instruction.

Under Article 2 of the UCC, if goods do not conform to the contract,

a buyer may use the self-help remedies of rejection (Ark. Code Ann. § 4-2-602) and revocation of acceptance (Ark. Code Ann. § 4-2-608). The drafters of the Code preferred using the words "rejection" and "revocation of acceptance" rather than "rescission" to avoid the confusing body of law which had arisen throughout the country in rescission cases. 1 WHITE & SUMMERS, UNIFORM COMMERCIAL CODE, § 8-1 (3rd ed. 1988).

Rejection of goods requires timely notice from the buyer. Rejection also must come within a reasonable time after their delivery or tender and before the goods are accepted. Ark. Code Ann. §§ 4-2-602 and 4-2-606. Rejection of goods by the buyer gives the seller the right to cure the non-conformity. Ark. Code Ann. § 4-2-508.

Research References

West's Key Number Digest 1985B U 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Legal Encyclopedias
C.J.S., Sales §§ 599, 621

AMI 2517

ACCEPTANCE OF GOODS

A buyer accepts goods when:

[after having had a reasonable opportunity to inspect the goods, the buyer signifies to a seller that the goods are conforming or that (he) (she) will take them in spite of their not conforming] [or]

[after having had a reasonable opportunity to inspect the goods, the buyer fails to make an effective rejection of the goods] [or]

[a buyer does any act that is inconsistent with the seller's ownership] [, such act is wrongful as against the seller and the seller ratifies such act].

NOTE ON USE

Use the appropriate bracketed sub-paragraph(s) as warranted by the evidence.

COMMENT

This instruction is based on Ark. Code Ann. § 4-2-606. Acceptance of goods by a buyer precludes rejection of the goods. Ark. Code Ann. § 4-2-607(2). What constitutes non-conforming delivery, acceptance, rejection, or revocation of acceptance is a question for the jury to be determined by the facts of each particular case. *Marine Mart, Inc. v. Pearce*, 252 Ark. 601, 480 S.W.2d 133 (1972).

The remedies available to a buyer depend, in part, upon whether he accepts the goods. Ark. Code Ann. § 4-2-607 describes the general legal consequences of acceptance. After acceptance, a buyer must pay the contract price (unless he is entitled to a reduction or damages because of a non-conformity or breach of warranty), the buyer loses his right to reject, and the time begins to run for the buyer to complain of any breach. 1 WHITE & SUMMERS, UNIFORM COMMERCIAL CODE, § 8-21 (3rd ed. 1988). A buyer who does not reject may be able to revoke acceptance of the goods if the buyer's circumstances fit within the elements described in Ark. Code Ann. § 4-2-608 (AMI 2518).

A buyer can choose to accept non-conforming goods. While the buyer

affirms the transaction by so accepting such goods, he may still be entitled to damages for the non-conformity, or for a breach of warranty (AMI 2520); and possibly incidental (AMI 2521) and consequential damages (AMI 2522).

Whether the buyer has accepted goods is unrelated to the issue of whether title to the goods has passed from the seller to the buyer. 1 WHITE & SUMMERS, UNIFORM COMMERCIAL CODE, § 8-2 (3rd ed. 1988).

The language in the second part of Ark. Code Ann. § 4-2-606(1)(c) recognizes that circumstances may exist in which a buyer takes certain actions with respect to goods pursuant to an option or duty imposed by law or agreement, and that such actions may not constitute acceptance unless they are "wrongful" as against the seller. See Commentary to Ark. Code Ann. § 4-2-606(1)(c). This instruction may thus need to include the second bracketed phrase in the last paragraph if a particular case involves such facts.

Research References

West's Key Number Digest
Sales ◊2854(4)

Legal Encyclopedias
C.J.S., Sales §§ 599, 621

AMI 2518

ISSUES—REVOCATION OF ACCEPTANCE

 contends that [he] [she] [it] was entitled to
(Buyer)
revoke acceptance of [even though
(the goods) (the goods)
were accepted by (him) (her)(it)], and has the burden
of proving each of the following six essential
propositions:

First, that the failed to conform to the
(the goods)
contract;

Second, that the non-conformity substantially
impaired the value of to ;
(the goods) (buyer)

Third, that the acceptance of by was:
(the goods) (buyer)

[on the reasonable assumption that the non-
conformity would be cured;]

[reasonably induced either by the difficulty of
discovery before acceptance, or by the as-
surances of];
(seller)

Fourth, that the revocation of acceptance was
within a reasonable time after discovered, or
(buyer)
should have discovered, the non-conformity;

Fifth, that notified of [his][her][its] revo-
(buyer) (seller)
cation of acceptance; and

Sixth, that there has been no substantial change
in the condition of not caused by their own
(the goods)

defect(s).

NOTE ON USE

Use the first bracketed portion of the first paragraph if rejection is also an issue.

The alternatives within the third proposition are set off by brackets because they are mutually exclusive. Use the first bracketed sentence if the buyer accepted the goods knowing of the non-conformity. Use the second bracketed sentence if the non-conformity was not discovered by the buyer prior to acceptance.

COMMENT

This instruction is based on Ark. Code Ann. § 4-2-608. Whether goods are non-conforming and whether notice of revocation of acceptance was given within a reasonable time are questions of fact. *O'Neal Ford, Inc. v. Earley*, 13 Ark. App. 189, 681 S.W.2d 414 (1985).

Under Article 2 of the UCC, if goods do not conform to the contract, a buyer may use the self-help remedies of rejection (Ark. Code Ann. § 4-2-602) and revocation of acceptance (Ark. Code Ann. § 4-2-608). The drafters of the Code preferred using the words rejection and revocation of acceptance rather than "rescission" to avoid the confusing body of law which had arisen throughout the country in rescission cases. 1 WHITE & SUMMERS, UNIFORM COMMERCIAL CODE, § 8-1 (3rd ed. 1988).

Arkansas apparently follows a minority rule in allowing a right to cure after a revocation of acceptance. See *Rhode v. Kremer*, 280 Ark. 136, 655 S.W.2d 410 (1983), and 1 WHITE & SUMMERS, UNIFORM COMMERCIAL CODE, §§ 8-4, 8-5 (3rd ed. 1988).

Research References

West's Key Number Digest
Sales ◊2854(5)

Legal Encyclopedias
C.J.S., Sales §§ 599, 621

AMI 2519

**BUYER'S DAMAGES FOR NON-DELIVERY,
REJECTION OR REVOCATION**

[If you decide for _____ on the question of _____
(buyer) (insert
particular issue involved)] [If an interrogatory requires you to
assess the damages of _____], you must then fix the
(buyer)
amount of money that will reasonably and fairly
compensate [him][her][it] for [any of] the following
element(s) of damage:
(number)

*[First: The return of so much of the price as has
been paid;] [and]*

*[Second: The difference between the contract
price and the cost of goods reasonably purchased in
good faith and without unreasonable delay in substi-
tution for those due from _____;]
(seller)*

*[Second: The difference between the contract
price and the market price of the goods at the time
_____ learned of the breach by _____;] [and]
(buyer) (seller)*

*[Third: Any (incidental) (or) (consequential) dam-
ages as explained in these instructions.]*

Whether [this] [(either) (any) of these] element(s)
of damage has been proved by the evidence is for
you to determine.

[Any damages recoverable by _____ are to be
(buyer)
reduced by any expenses saved in consequence of

the breach by _____.]
(seller)

NOTE ON USE

Since this instruction will be used in all cases where goods were either not delivered or were not accepted, insert in the first bracketed sentence the particular issues involved in the case (e.g., seller's non-delivery, buyer's rejection, buyer's revocation of acceptance).

The alternatives contained in the second element are mutually exclusive. Use the first alternative when the buyer has elected to cover; otherwise, use the second alternative.

The third element should be used in conjunction with AMI 2521 and AMI 2522 when incidental and/or consequential damages are claimed.

Use the final bracketed paragraph when there is evidence of saved expense.

COMMENT

This instruction is based on Ark. Code Ann. § 4-2-711, which prescribes the buyer's remedies for undelivered or unaccepted goods. Ark. Code Ann. § 4-2-712 prescribes the measure of damages where the buyer has elected to cover, and § 4-2-713 prescribes the measure in all other cases.

Other remedies available to the buyer, such as specific performance, replevin of goods identified to the contract, and enforcement of the security interest in rejected goods, will usually be issues for the court. If there are fact issues for a jury pertinent to such remedies, appropriate instructions should be prepared.

Failure to cover does not bar a buyer from resorting to other remedies, Ark. Code Ann. § 4-2-712(3), but it can bar recovery of consequential damages that could have reasonably been prevented. *See* Ark. Code Ann. § 4-2-715(2)(a). The doctrine of avoidable consequences, under which one cannot recover damages flowing from consequences that might reasonably have been avoided, requires only reasonable diligence and ordinary care, and does not require large expense. *Lake Village Implement Co., Inc. v. Cox*, 252 Ark. 224, 231, 478 S.W.2d 36, 42 (1972).

Research References

West's Key Number Digest
Sales ☞ 2880 to 2889

Legal Encyclopedias
C.J.S., Sales §§ 599, 600 to 603, 621

AMI 2520

**BUYER'S DAMAGES FOR ACCEPTED GOODS—
BREACH OF WARRANTY**

[If you decide for _____ on the question of _____
(buyer) (insert
particular issue involved)] [If an interrogatory requires you to
assess the damages of _____], you must then fix the
(buyer)
amount of money that will reasonably and fairly
compensate [him][her][it] for [any of] the following
element(s) of damage:
(number)

*[(First:) [The difference at the time and place of
acceptance between the value of the goods accepted
and the value they would have had if they had been
as warranted (unless special circumstances show
proximately caused damages in a different amount)]
[The loss resulting in the ordinary course of events
from the seller's breach as determined in any manner
which is reasonable] [and]*

*[(Second:) Any (incidental) (or) (consequential)
damages as explained in these instructions.]*

Whether [this] [(either) (any) of these] element(s)
of damage has been proved by the evidence is for
you to determine.

[Any damages recoverable by _____ are to be
(buyer)
reduced by any expenses saved in consequence of
the breach by _____.]
(seller)

NOTE ON USE

Since this instruction will be used in all cases where goods are ac-

cepted, insert in the first bracketed sentence the particular issue involved in the case (e.g., breach of implied warranty or breach of express warranty).

If special circumstances show proximate damages of a different amount than the first stated element, the measure demonstrated by the special circumstances should be substituted for, or added to, the first element. Ark. Code Ann. § 4-2-714(2). If there is a fact issue as to the existence of such circumstances, this instruction may be modified.

If consequential damages are to be submitted, use AMI 2522 in conjunction with AMI 2443.

The first bracketed phrase in the first alternative element is the usual measure of damages for breach of warranty. If the case involves a non-conforming tender other than a breach of warranty, use the second bracketed phrase in the first alternative element.

Use the final bracketed paragraph when there is evidence of saved expense.

COMMENT

This instruction is based on Ark. Code Ann. §§ 4-2-714 and 4-2-715. See *F.L. Davis Builders Supply, Inc. v. Knapp*, 42 Ark. App. 52, 60-61, 853 S.W.2d 288, 292 (1993) (market value differential is not the sole measure in every case).

The concept of non-conformity is broader than breach of warranty, with the latter being included within the former. *Ford Motor Credit Co. v. Harper*, 671 F.2d 1117 (8th Cir. 1982). See also *Microsize, Inc. v. Arkansas Microfilm, Inc.*, 29 Ark. App. 49, 780 S.W.2d 574 (1989). Ark. Code Ann. § 4-2-714(2) specifies the basic measure of damages for breach of warranty cases, while § 4-2-714(1) sets forth a broader standard for other non-conformity cases.

Research References

West's Key Number Digest
Sales ◊2880 to 2889

Legal Encyclopedias
C.J.S., Sales §§ 599, 604, 621

AMI 2521

BUYER'S INCIDENTAL DAMAGES

Incidental damages resulting from a breach by
include:
(seller)

***[expenses reasonably incurred in (inspection)
(receipt) (transportation) (and) (care and custody
of goods rightfully rejected)] [and]***

***[any commercially reasonable (charges) (expen-
ses) (or) (commissions) in connection with obtain-
ing substitute goods] [and]***

***[any (other) reasonable expense incident to the
(delay or other) breach].***

**Whether [this] [(either) (any) of these] element(s)
has been proved by the evidence is for you to
determine.**

NOTE ON USE

Use the appropriate alternative element(s) as warranted by the
evidence.

COMMENT

This instruction is based on Ark. Code Ann. § 4-2-715(1).

Research References

West's Key Number Digest
Sales ◊2885

Legal Encyclopedias
C.J.S., Sales § 605

AMI 2522

BUYER'S CONSEQUENTIAL DAMAGES

Consequential damages resulting from a breach by _____ include:
(seller)

**[any loss resulting from general or particular requirements and needs of which _____ at the time
(seller)
of contracting had reason to know (*and which could not reasonably be prevented by acquiring substitute goods or otherwise*)]**

[and] [*injury to person or property proximately caused by the breach. (In this regard you may consider [any of] the following elements of damage sustained which you find were proximately caused by the breach: (Insert the elements))*].

Whether [*this*] [*any of these*] element(s) has been proved by the evidence is for you to determine.

NOTE ON USE

When consequential damages are in issue in cases governed by Article 2 of the Uniform Commercial Code, use this instruction, not AMI 2443.

Use the alternative clause in the first bracketed element when there is an issue as to whether the claimed loss could reasonably have been prevented.

When the second element is submitted, use any pertinent elements of damages from AMI Chapter 22. For a measure of damages for the lost profits as consequential damages, see AMI 2443.

COMMENT

This instruction is based on Ark. Code Ann. § 4-2-715(2). In *Tremco, Inc. v. Valley Aluminum Prods. Corp.*, 38 Ark. App. 143, 145, 831 S.W.2d 156, 158 (1992) the court stated that “[c]onsequential damages resulting

from a seller's breach include any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise." *See also*, *Smith v. Russ*, 70 Ark. App. 23, 13 S.W.3d 920 (2000) (at the time of contracting, there was no evidence that seller had reason to know the particular needs of the buyer).

The tacit agreement rule for the recovery of consequential damages is inapplicable to cases under the Uniform Commercial Code. Ark. Code Ann. § 4-2-715, Comment 2; *Morrow v. First Nat. Bank of Hot Springs*, 261 Ark. 568, 572, 550 S.W.2d 429, 431 (1977) ("The tacit agreement test, to be sure, has been questioned and was rejected by the draftsmen of the Uniform Commercial Code."); *Lewis v. Mobil Oil Corp.*, 438 F.2d 500, 510 (8th Cir. 1971); H. BRILL, *LAW OF DAMAGES* § 4.4 (5th ed.) ("Although the Uniform Commercial Code has rejected the tacit agreement doctrine, the Arkansas Supreme Court has continued to adhere to the doctrine in non-Code contractual cases."); *See also*, Phillip M. Brick, Jr., Note, *Agree to Disagree: The Inequity of Arkansas's Tacit-Agreement Test as Seen in Deck House, Inc. v. Link*, 62 Ark. L. Rev. 361, 375 (2009) ("Because Arkansas has adopted the UCC, it appears that '[t]he tacit agreement rule does not apply to contracts involving the sale of goods.'") (quoting *Coorstek, Inc. v. Elec. Melting Servs. Co.*, No. 4:06CV001726-JMM, 2008 WL 160620, at *6 (E.D. Ark., Jan. 15, 2008)).

The failure to cover can bar recovery of consequential damages that could reasonably have been prevented thereby. *See* Ark. Code Ann. § 4-2-715(2)(a). The doctrine of avoidable consequences, under which one cannot recover damages flowing from consequences that might reasonably have been avoided, requires only reasonable diligence and ordinary care, and does not require large expense. *Lake Village Implement Co., Inc. v. Cox*, 252 Ark. 224, 478 S.W.2d 36, 42 (1972).

Research References

West's Key Number Digest
Sales ⇨ 2886

Legal Encyclopedias
C.J.S., Sales §§ 606 to 609

AMI 2523

SELLER'S REMEDIES

If a buyer *[wrongfully rejects the goods] [or] [fails properly to revoke acceptance of the goods] [or] [fails to make a payment due on or before delivery] [or] [repudiates with respect to a part or the whole of the contract]*, a seller may:

[(1) withhold delivery of such goods;]

[(2) stop delivery of goods;]

[(3) resell and recover damages as I will instruct you;]

[(4) recover (damages for non-acceptance) (the price);]

[(5) cancel the contract.]

NOTE ON-USE

This instruction should be given as a lead-in or transitional instruction in cases involving a breach by the buyer to give the jury some context in which to understand the issues. Use the appropriate bracketed subsection(s) as warranted by the evidence.

COMMENT

This instruction is based on Ark. Code Ann. § 4-2-703.

Research References

West's Key Number Digest
Sales ¶2878, 2880 to 2882

Legal Encyclopedias
C.J.S., Sales §§ 536 to 585

AMI 2524

**SELLER'S DAMAGES—BUYER'S
NON-ACCEPTANCE OR REPUDIATION**

[If you decide for _____ on the question of _____
(seller) (insert
particular issue involved)] [If an interrogatory requires you to
assess the damages of _____], you must then fix the
(seller)
amount of money that will reasonably and fairly
compensate [him][her][it] for [any of] the following
element(s) of damage:
(number)

[The difference between the market price of _____
(the
goods) at the time and place for tender and the unpaid
contract price] [and] [any incidental damages as
explained in these instructions, but less expenses
saved in consequence of the breach by _____.]
(buyer)

[The profit (*including reasonable overhead*) which
would have made from full performance by _____,]
(seller) (buyer)
[and] [*any incidental damages as explained in these
instructions*] [and] [(costs reasonably incurred by
(seller) (less) (payments made by (buyer) (and) (the
proceeds of any resale of _____).]
(the goods)

Whether [*this*] [(*either*) (*any*) of *these*] element(s)
of damage has been proved by the evidence is for
you to determine.

NOTE ON USE

Use this instruction when the seller seeks damages for non-
acceptance or repudiation by the buyer pursuant to Ark. Code Ann. § 4-

2-708. Since the issue of the seller's damages can come before the jury in a number of ways (e.g., the buyer's failure properly to reject, the buyer's acceptance of goods, or the buyer's failure to properly revoke acceptance), the practitioner should insert the particular circumstance in the first sentence if the issue is submitted on a general verdict. Use the first set of bracketed elements when that measure of damages would put the seller in as good a position as performance by the buyer would have done. Otherwise, use the second set of bracketed elements.

Use this instruction with AMI 2527 (Seller's Incidental Damages) and AMI 2528 (Proof of Market Price) when there are jury questions concerning those issues.

COMMENT

This instruction is based on Ark. Code Ann. § 4-2-708. This instruction provides the measures of damage for non-acceptance or repudiation. The measures of damage when the seller seeks the price of the goods (Ark. Code Ann. § 4-2-709) or damages after resale (Ark. Code Ann. § 4-2-706) are provided in AMI 2525 and AMI 2526, respectively.

If the difference between the market price and the contract price is inadequate to put the seller in as good a position as performance would have done, a seller can obtain lost profits as specified in Ark. Code Ann. § 4-2-708(2).

Research References

West's Key Number Digest
Sales ⇨2878, 2880 to 2882

Legal Encyclopedias
C.J.S., Sales §§ 536 to 585

AMI 2525

SELLER'S DAMAGES—ACTION FOR THE PRICE

[If you decide for _____ on the question of _____
(seller) (insert)
 _____] [If an interrogatory requires you to
 particular issue involved)
 assess the damages of _____] you must then fix the
(seller)
 amount of money that will reasonably and fairly
 compensate [him][her][it] for [any of] the following
 _____ element(s) of damage:
(number)

[(First:) the price of:

(_____ if they were accepted) (or)
(the goods)

(conforming goods which were lost or de-
 stroyed within a commercially reasonable
 time after risk of their loss passed to _____)
(buyer)

(or)

(_____ if they were identified to the contract
(the goods)
 and {if _____ was unable after reasonable ef-
(seller)
 fort to resell them at a reasonable price} {or}
*{the circumstances reasonably indicate that
 efforts to resell the goods will be unsucces-
 ful}*) (and)]

[(Second:) any incidental damages as explained
 in these instructions.]

Whether [this] [either of these] element(s) of dam-
 age has been proved by the evidence is for you to
 determine.

NOTE ON USE

Use this instruction when the seller seeks the price of the goods as his measure of damages. This instruction should be used in conjunction with AMI 2524, since a seller who is not allowed the price may still be entitled to damages for the buyer's non-acceptance under Ark. Code Ann. § 4-2-708.

Use AMI 2527 with this instruction when there is a jury question concerning incidental damages.

COMMENT

This instruction is based on Ark. Code Ann. § 4-2-709. *See Unlaub Co., Inc. v. Sexton*, 568 F.2d 72 (8th Cir. 1977) (buyer did not reject or attempt to reject the tender; there was opportunity for inspection of the goods, and therefore, seller was entitled to recover the unpaid balance of the contract price under subsection 2-709(1)(a)); *Watson v. Miears*, 612 F. Supp. 1235 (W.D. Ark. 1984), *aff'd*, 772 F.2d 433 (8th Cir. 1985) (seller was entitled to recover the unpaid balance of the contract price after an opportunity for inspection of the goods and acceptance of the goods, some of which had been disposed of by buyer).

Research References

West's Key Number Digest
Sales ⇨2881

Legal Encyclopedias
C.J.S., Sales §§ 559 to 573

AMI 2526

SELLER'S DAMAGES AFTER RESALE OF GOODS

[If you decide for _____ on the question of _____
(seller) (insert
particular issue involved)] [If an interrogatory requires you to
assess the damages of _____], then you should con-
(seller)
sider _____'s contention that [he][she][it] is entitled to
(seller)
recover damages after resale of _____.
(the goods)

In order to recover any such damages, _____ first
(seller)
has the burden of proving that the resale was made in
good faith and in a commercially reasonable manner.

If you decide for _____ on that issue, you must
(seller)
then fix the amount of money that will reasonably and
fairly compensate [him][her][it] for [any of] the follow-
ing _____ element(s) of damage:
(number)

[(First:) the difference between the resale price of
and the contract price] [and]
(the goods)

*[(Second:) any incidental damages as explained
in these instructions]*

[Less any expenses saved by _____ as a result of
(seller)
_____'s breach].
(buyer)

Whether *[this] [either of these]* element(s) of dam-
age has been proved by the evidence is for you to
determine.

NOTE ON USE

Use this instruction when the seller claims damages after resale of the goods.

Use the bracketed paragraph regarding expenses when there is evidence that the seller saved expenses as a result of the buyer's breach.

Additional instructions consistent with Ark. Code Ann. § 4-2-706(2) to (6) regarding the nature and terms of the resale, e.g., private or public sale, may be needed if there is evidence that the resale involved those issues.

Use AMI 2527 with this instruction when there is a jury question concerning the seller's incidental damages.

COMMENT

This instruction is based on Ark. Code Ann. § 4-2-706.

See also *McMillan v. Meuser Material & Equip. Co., Inc.*, 260 Ark. 422, 425-426, 541 S.W.2d 911, 912 (1976) (what is a reasonable time for a resale depends upon the nature of the goods, the conditions of the market and the other circumstances of the case, citing Comment 5 to § 4-2-706).

Research References

West's Key Number Digest
Sales ☞2882

Legal Encyclopedias
C.J.S., Sales §§ 555 to 558

AMI 2527

SELLER'S INCIDENTAL DAMAGES

Incidental damages resulting from a breach by
 include any commercially reasonable (*charges*)
(*buyer*) (*expenses*) (*or*) (*commissions*) incurred:

[in stopping delivery]

*[in the (transportation) (care) (and) (or) (cus-
tody) of goods after 's breach]*
(*buyer*)

*[in connection with the return or the resale of
the goods]*

[or] [otherwise resulting from the breach.]

NOTE ON USE

Use this instruction with AMI 2524, 2525 and 2526 when there is a jury question concerning the seller's incidental damages.

Use the appropriate bracketed element(s) as warranted by the evidence.

COMMENT

This instruction is based on Ark. Code Ann. § 4-2-710.

Research References

West's Key Number Digest
Sales ⅈ2885

Legal Encyclopedias
C.J.S., Sales §§ 575, 583

AMI 2528

DAMAGES—PROOF OF MARKET PRICE

The market price of goods is:

[the price of such goods prevailing at the time when _____ learned of the breach.]

(seller) (buyer)

[the price (prevailing within any reasonable time before or after the time described) (or) (at any other place which in commercial judgment or under usage of trade would serve as a reasonable substitute for the price prevailing at the time or place, making any proper allowance for the cost of transporting the goods to or from such other place).]

NOTE ON USE

Use this instruction with AMI 2519 or AMI 2524 when there is a jury question concerning the market price of the goods. Use the second bracketed paragraph if evidence of a price prevailing at the relevant time or place is not readily available.

COMMENT

This instruction is based on Ark. Code Ann. § 4-2-723. Evidence of a relevant price prevailing at a time or place other than when the claiming party learned of the breach offered by one party is not admissible unless and until the other party has been given such notice as is sufficient to prevent unfair surprise. See § 4-2-723(3) and Chappell Chevrolet, Inc. v. Strickland, 4 Ark. App. 108, 628 S.W.2d 25 (1982).

Research References

West's Key Number Digest
Sales ◊2884

Legal Encyclopedias
C.J.S., Sales §§ 576, 583

NOTE ON USE

Use this instruction when the plaintiff contends that the limited remedy for breach of warranty failed of its essential purpose. Use the appropriate bracketed elements. If applicable law expresses another essential element which is appropriate to a particular case, the instruction should be modified to state the element.

Do not use the final bracketed paragraph when the case is submitted on interrogatories.

COMMENT

This instruction is based on Ark. Code Ann. § 4-2-719, which permits the limitation of remedies. Resort to a remedy provided is optional unless it is expressly agreed to be exclusive. Ark. Code Ann. § 4-2-719(1)(b). If an exclusive or limited remedy fails of its essential purpose, the jury may award any of the remedies otherwise provided under the UCC. Ark. Code Ann. § 4-2-719(2).

Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Ark. Code Ann. § 4-2-719(3). Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not. *Id.*

Research References

West's Key Number Digest

Sales ⚡2891

Legal Encyclopedias

C.J.S., Sales § 517

CHAPTER 26

TRADE SECRETS

Table of Instructions

AMI

2600. Issues—Claim for Damages Based Upon Trade Secret Misappropriation.
2601. Definition—Misappropriation.
2602. Definition—Trade Secret.
2603. Definition—Improper Means.
2604. Measure of Damages—Misappropriation of Trade Secrets.

AMI 2600

ISSUES—CLAIM FOR DAMAGES BASED UPON TRADE SECRET MISAPPROPRIATION

 claims damages from and has the
[Plaintiff] [defendant]
burden of proving each of three essential
propositions:

First, that *[he][she][it]* has sustained damages;

Second, that owned a trade secret;
[plaintiff]

Third, that misappropriated 's trade
[defendant] [plaintiff]
secret.

Fourth, that the misappropriation of a trade se-
cret was a proximate cause of 's damages.
[plaintiff]

[If you find from the evidence in this case that each of these propositions has been proved, then your verdict should be for _____ (against the party or parties found to have misappropriated the trade secret); but if, on the other hand, you find from the evidence that any of these propositions has not been proved, then your verdict should be for _____].

[defendant]

NOTE ON USE

Use the parenthetical portion within the bracketed paragraph only when the plaintiff claims damages from two or more defendants.

Do not use the final bracketed paragraph when the case is submitted on interrogatories.

COMMENT

This instruction is based on Ark. Code Ann. § 4-75-601.

Research References

West's Key Number Digest
Antitrust and Trade Regulation §434

AMI 2601

DEFINITION—MISAPPROPRIATION

When I use the word “misappropriation” in these instructions, I mean:

- (A) Acquisition of another person’s trade secret, by a person who knows or has reason to know that the trade secret was acquired by improper means; *[or]*
- (B) Disclosure or use of a trade secret belonging to another person, without express or implied consent, by a person who:
 - (a) Used improper means to acquire knowledge of the trade secret; *[or]*
 - (b) At the time of disclosure or use, knew or had reason to know that *[his][her][its]* knowledge of the trade secret was:
 - (i) Derived from or through a person who had utilized improper means to acquire it; *[or]*
 - (ii) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; *[or]*
 - (iii) Derived from or through a person who owed a duty to to maintain its secrecy or limit its use; *[or]*

[plaintiff]
 - (c) Acquired the information by accident or mistake, and, before a material change of *[his][her][its]* position, knew or had

reason to know it was a trade secret.

NOTE ON USE

Use either paragraph A or B, or both, as warranted by the evidence.

Use the appropriate clauses of paragraph B as warranted by the evidence.

COMMENT

This instruction is based on Ark. Code Ann. § 4-75-601.

The disclosure or use of a trade secret may result in liability, as they are separate and distinct claims. *Southwestern Energy Co. v. Eickenhorst*, 955 F. Supp. 1078 (W.D. Ark. 1997), *aff'd*, *mem.* 175 F.3d 1025 (8th Cir. 1999).

Research References

West's Key Number Digest

Antitrust and Trade Regulation ¶434.

AMI 2602

DEFINITION—TRADE SECRET

When I use the words “trade secret” in these instructions, I mean information such as a *[formula]* *[or]* *[pattern]* *[or]* *[compilation]* *[or]* *[program]* *[or]* *[device]* *[or]* *[method]* *[or]* *[technique]* *[or]* *[process]* that meets the following three requirements:

- (a) The information derive actual or potential independent economic value from not being generally known to other persons who could obtain economic value from its disclosure or use;
- (b) The information was not readily ascertainable, through proper means by such persons; and
- (c) The information was the subject of reasonable efforts to maintain its secrecy.

NOTE ON USE

Use this instruction when the term “trade secret” is used in another instruction. Choose the bracketed words applicable to the facts of each particular case.

COMMENT

This instruction is based on Ark. Code Ann. § 4-75-601(4) (“Definitions: ‘Trade secret’”).

Several Arkansas cases have stated, in varying formulations, that the six factors set out in the Restatement of Torts § 757, cmt. b (1939), are also involved in the determination of whether the information at issue constitutes a trade secret. For the reasons explained below, the Committee based this instruction on the statutory definition rather than the Restatement factors or a combination of both. Those factors, which differ in some respects from the statutory definition in the Arkansas Trade Secrets Act (“ATSA”), are as follows:

(1) the extent to which the information is known outside of [the plaintiff's] business; (2) the extent to which it is known by employees and others involved in [the plaintiff's] business; (3) the extent of measures taken by [the plaintiff] to guard the secrecy of the information; (4) the value of the information to [the plaintiff] and to [the plaintiff's] competitors; (5) the amount of effort or money expended by [the plaintiff] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

The first post-ATSA Arkansas case to embrace the Restatement factors was *Saforo & Assocs., Inc. v. Porocel Corp.*, 337 Ark. 553, 991 S.W.2d 117 (1999), which reviewed *de novo* under the "clear error" standard the chancery court's findings that defendant had misappropriated plaintiff's trade secrets. The court in *Saforo*, referring to "the six factors articulated in *Vigoro Industries, Inc. v. Cleveland Chemical Co. of Arkansas, Inc.*, 866 F. Supp. 1150 (E.D. Ark. 1994), [*aff'd in part and rev'd in part on other grounds*, *Vigoro Indus., Inc. v. Crisp*, 82 F.3d 785 (8th Cir. 1996)]," stated that "[w]e hereby adopt the *Vigoro* factors as the controlling analysis for determining whether any particular information constitutes a trade secret." 337 Ark. at 559, 991 S.W.2d at 120. The six factors applied in *Saforo* are actually from the Restatement, not *Vigoro*, which applied the statutory definition and not the Restatement factors. Several other cases followed *Saforo* in applying the six factors. Each opinion states the factors' role in different terms. Two cases, like *Saforo*, involved *de novo* review for "clear error" of chancery court findings: *ConAgra, Inc. v. Tyson Foods, Inc.*, 342 Ark. 672, 678, 30 S.W.3d 725, 729 (2000) ("Bearing these standards [for review of chancery findings] firmly in mind, we turn then to the applicable criteria for determining whether company information qualifies as a trade secret. Our caselaw has endorsed these [six] factors as integral in making that determination"), citing *Saforo*, *Vigoro*, and Ark. Code Ann. § 4-75-601; *Weigh Systems South, Inc. v. Mark's Scales & Equip., Inc.*, 347 Ark. 868, 874, 68 S.W.3d 299, 301 (Ark. 2002) ("We have identified several factors which we find material to our determination of whether information is a trade secret. . . . To determine whether [plaintiff] had trade secrets that [defendants] misappropriated, it is necessary to consider the six factors articulated in *Saforo* to [sic] the facts surrounding this case. "). One case involved *de novo* review of the liability ruling in a "hybrid" case from chancery court, in which the trial court determined liability and the damages issue was submitted to a jury. *Tyson Foods, Inc. v. ConAgra, Inc.*, 349 Ark. 469, 478-79, 79 S.W.3d 326, 331 (Ark. 2002) ("In addition to the statute, this court has endorsed a six-factor analysis in determining whether information qualifies as a trade secret. "). And one case, tried to a jury, involved appeal of denial of a motion for directed verdict. *Wal-Mart Stores, Inc. v. The P.O. Market, Inc.*, 347 Ark. 651, 666-67, 66 S.W.3d 620, 630 (Ark. 2002) ("In addition to this [statutory] definition, the issue of whether information constitutes a trade secret under the ATSA is governed by six factors. . . . Information must meet both the ATSA definition and all of the six *Saforo* factors in order to qualify as a trade secret. ").

The Committee understands the foregoing cases to have “set forth six factors that *reviewing courts* must analyze, in addition to the definition contained within the statute, to determine if information is entitled to trade secret protection,” *Southeast X-Ray, Inc. v. Spears*, 929 F. Supp.2d 867, 874 (W.D. Ark. 2013) (emphasis added), rather than to have announced elements to be submitted to a jury. First, none of those cases addresses the question of jury instructions. Instead, all but one involve *de novo* appellate review of chancery court findings. And *Wal-Mart Stores, Inc. v. The P.O. Market, Inc.*, the one case in which liability was decided by a jury, involved appellate review of the sufficiency of the evidence. Wal-mart challenged the jury instructions in that case, but the Arkansas Supreme Court, concluding that the case ought not to have been submitted to the jury, did not reach that issue. *Vigoro*, the Eastern District of Arkansas opinion cited in *Saforo*, set forth findings of fact and conclusions of law after a bench trial; but, as mentioned, that court applied the statutory definition of “trade secret” and not the Restatement factors. Second, a claim for misappropriation of a trade secret in Arkansas is now a statutory, not common law, cause of action. ATSA, based on a Uniform Act, expressly “displaces conflicting tort, restitutionary, and other law of this state pertaining to civil liability for misappropriation of a trade secret.” Ark. Code Ann. § 4-74-602(a); *R.K. Enterprises, LL.C. v. Pro-Comp Mgt., Inc.*, 356 Ark. 565, 158 S.W.3d 685 (2004); *Vigoro, supra*. Third, other jurisdictions that have adopted the Uniform Trade Secrets Act are divided on the question whether to include the six Restatement factors in jury instructions for definition of a “trade secret.” Some states follow the approach described above: basing jury instructions on the Uniform Act definition, but also applying the six Restatement factors when courts determine the sufficiency of the plaintiff’s evidence that the information is a protectable trade secret. *E.g.*, *Vernon’s Okla. Forms 2d*, Okla. Uniform Jury Instr.— Civil 29.2 (2014) (following statutory definition); *MTG Guarnieri Mfg., Inc. v. Clouatre*, 239 P.2d 202, 209-10 (Okla. Civ. App. 2010) (“The UTSA sets forth the definition of a trade secret in Oklahoma; in addition, the Oklahoma Supreme Court has adopted six factors from the Restatement of Torts, § 757, Comment b (1939), to help determine whether information is a trade secret.”), *citing* *Amoco Production Co. v. Lindley*, 609 P.2d 733 (Okla. 1980) (a pre-Uniform Act case). Some states simply track the Uniform Act definition. *E.g.*, 4 Minn. Prac., Jury Instr. Guides – Civil § 40.20 (2014); Ore. Uniform Civil Jury Instr. No. 51.02 (2014). Michigan included the six factors in its instructions for claims arising before Michigan adopted the Uniform Trade Secrets Act, but shifted to an Act-based definition for claims arising thereafter. Hon. William Murphy & John VandenHombergh, Mich. Non-Standard Jury Instr. Civil §§ 35.6 & 35.7 (2014). Some states follow the Uniform Act definition, but also include multi-factor elaborations of the terms “independent economic value” and “reasonable efforts to maintain secrecy.” 6A Wash. Prac., Wash. Pattern Jury Instr. Civ. 351.02, 351.05, 351.08 (2013); Jud’l Council of Calif. Civil Jury Instr. 4402, 4404, 4412 (2015). And some include the Restatement factors in the instructions as factors the jury “may consider” in determining whether the information is a trade secret. *E.g.*, Iowa Civil Jury Instr. 3400.2 (2004); 1 Civil Ohio Jury Instr.537.11

(2015). The current Restatement has dropped the multi-factor approach, defining a "trade secret" as "any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others." Restatement (Third) of Unfair Competition § 39 (1995).

A customer list may constitute a trade secret where it meets the requisites of the Arkansas Trade Secrets Act, and it is immaterial whether the list is written or memorized. *Allen v. Johar*, 308 Ark. 45, 823 S.W.2d 824 (1992).

What constitutes a trade secret is a fact-intensive question. *Bradshaw v. Alpha Packing, Inc.*, 2010 Ark. App. 659. Customer lists, pricing, ongoing projects and profit information may all be trade secrets under the proper circumstances. *Id.* Evidence that an employee had relationships with some customers predating the employee's or customer's relationship with the employer may be a factor in deciding whether a customer list is a trade secret, but may not be dispositive. *Id.*

Research References

West's Key Number Digest
Antitrust and Trade Regulation ¶434

AMI 2603

DEFINITION—IMPROPER MEANS

When I use the words “improper means” in these instructions, I mean the acquisition of a trade secret by *[theft]* *[or]* *[bribery]* *[or]* *[misrepresentation]* *[or]* *[breach of a duty to maintain secrecy]* *[or]* *[inducing another to breach a duty of secrecy]* *[or]* *[espionage through any means]*.

NOTE ON USE

Use the instruction when the term “improper means” is used in another instruction. Choose the bracketed clauses applicable to the facts of each particular case.

COMMENT

This instruction is based on Ark. Code Ann. § 4-75-601.

Research References

West's Key Number Digest
Antitrust and Trade Regulation ¶434

AMI 2604

MEASURE OF DAMAGES—MISAPPROPRIATION OF TRADE SECRETS

(A) The value of any net profits lost by _____ (plaintiff) [and the present value of any net profits reasonably certain to be lost by _____ (plaintiff) in the future], [and]

(B) *[To the extent not included within any such lost profits,]* [The] [the] value of any net profit unjustly gained by _____ [and the present value of any unjust
(defendant)
net profits reasonably certain to be gained in the future by _____].
(defendant)

(C) [To the extent not included within the foregoing element(s),] [The] [the] value of _____ (insert description of benefit) [or] [any other benefit] unjustly gained by _____ (defendant) as a result of the misappropriation.

NOTE ON USE

Within the format of AMI 2201, use the appropriate element(s) from paragraphs (A) and (B). Use paragraph (C) only if there is evidence of unjust enrichment to the defendant in a form other than profits, such as the value placed on the trade secret by the parties.

Use the introductory bracketed clause in paragraphs (B) and (C) if multiple elements are submitted.

COMMENT

This instruction is based upon Ark. Code Ann. § 4-75-606. The statute uses the terms “actual loss” and “unjust enrichment” to describe the elements of damage. The terms include lost profits. *Saforo & Associates, Inc. v. Porocel Corp.*, 337 Ark. 553, 991 S.W.2d 117 (1999). “Lost profits” under the statute means net profit. *Brown v. Ruallam Enterprises, Inc.*, 73 Ark. App. 296, 44 S.W.3d 740 (2001). Annot., *Damages—Misappro-*

priation of Trade Secrets, 11 A.L.R.4th 12 discusses several other elements of damage and was cited with approval in *Saforo*.

Pursuant to Ark. Code Ann § 4-75-606(b), “a complainant may recover not only for the actual loss as may be shown by profits, but also the unjust enrichment caused by the misappropriation where that is not taken into account in computing damages for actual loss.” *Pro-Comp Management, Inc. v. R.K. Enterprises, LLC*, 366 Ark. 463, 237 S.W.3d 20 (2006).

Research References

West's Key Number Digest
Antitrust and Trade Regulation §434

CHAPTER 27

SECURITIES FRAUD

Table of Instructions

AMI

2700. Issues—Claim for Damages Based on Securities Fraud—Purchaser's Claim Against Seller.
2701. Issues—Claim for Damages Based on Securities Fraud—Seller's Claim Against Purchaser.
2702. Defenses—Securities Fraud.
2703. Definitions—Securities Fraud.
2704. Issues—Imputed Liability—Securities Fraud.
2705. Defense—Imputed Liability—Securities Fraud.
2706. Measure of Damages—Securities Fraud.

AMI 2700

ISSUES—CLAIM FOR DAMAGES BASED ON SECURITIES FRAUD—PURCHASER'S CLAIM AGAINST SELLER

 claims damages from **and has the**
[Plaintiff] [defendant]
burden of proving each of four essential propositions:

First, that **sold a security to** **in this**
[defendant] [plaintiff]
state;

Second, that **[offered to return the security**
[plaintiff]
purchased] [no longer owns the security];

Third, that **sold such security by means of**
[defendant]

[an untrue statement of a material fact] [or] [an omission to state a material fact necessary in order to make any statement made, in light of the circumstances under which it was made, not misleading];

And fourth, that [redacted] [plaintiff] did not know [that the statement was untrue] [or] [a material fact was omitted].

A fact or statement of fact is "material" if it was a substantial factor in influencing _____'s decision. It is not necessary, however, that it be the paramount or decisive factor, but only one that a reasonable person would attach importance to in making a decision.

[If you find from the evidence in this case that each of these propositions has been proved, then your verdict should be for _____; but if, on the other hand, you find from the evidence that any of these propositions has not been proved, then your verdict should be for _____.]

NOTE ON USE

Do not use the final bracketed paragraph when the case is submitted on interrogatories.

COMMENT

This instruction is based on Ark. Code Ann. § 23-42-106(a)(1)(B).

The Arkansas Securities Act ("the Act"), codified as Ark. Code Ann. §§ 23-42-101 et seq., creates a comprehensive regulatory scheme for securities transactions in this State. It regulates instruments that meet the statutory definition of "security," transactions involving such instruments, and professionals who regularly engage in such transactions. This jury instruction is for the civil claim most often brought in the courts of this State, the Blue Sky fraud claim.

The civil liability statute, § 23-42-106, creates several other causes

of action, including a cause for violation of registration requirements (§ 23-42-301), misrepresentation of the fact of exemption from registration (§ 23-42-212), sale of unregistered, nonexempt securities (§ 23-42-501), and market manipulation (§ 23-42-508). This statute also creates a cause of action for violation of Section 23-42-507, which is substantially identical to Rule 10-b(5), promulgated pursuant to Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C.A. § 78j(b)). Particularized instructions for such causes of action have not been prepared because such causes of action are infrequently brought in Arkansas state courts.

The issue of whether an underlying instrument involved in the transaction is properly denominated a “security” is a mixed question of law and fact ordinarily resolved by the court. *See, e.g.*, *Carder v. Burrow*, 327 Ark. 545, 940 S.W.2d 429 (1997). If a case requires a determination of fact with respect to whether the instrument is a security, the specific factual issue should be presented to the jury by an inquiry tailored to the particular fact in dispute. An interrogatory or interrogatories may provide the appropriate means. *See* AMI 3502. Because of the complexity of this determination and the impossibility of anticipating all such factual inquiries, a form instruction is not included in this Chapter.

The definition of “material” in this instruction is derived from AMI 402. The Committee believes it is substantially identical to that endorsed by the United States Supreme Court under federal securities law. *See Basic Inc. v. Levinson*, 485 U.S. 224, 240, 108 S. Ct. 978, 988, 99 L. Ed. 2d 194 (1988) (“[M]ateriality depends on the significance the reasonable investor would place on the withheld or misrepresented information.”); *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449, 96 S. Ct. 2126, 2132, 48 L. Ed. 2d 757 (1976) (“An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.”).

Section 23-42-102 provides definitions for a variety of terms that appear in the Act. Those definitions have not been incorporated into these instructions because the Committee believes such definitions will seldom be necessary. In the event of a factual dispute about the applicability of a particular term to a claim, the statutory definitions may provide a basis for supplemental instruction.

Research References

West's Key Number Digest
Securities Regulation ¶309

Legal Encyclopedias

C.J.S., Securities Regulation and Commodity Futures Trading Regulation §§ 544 to 552, 561 to 562

AMI 2701

ISSUES—CLAIM FOR DAMAGES BASED ON SECURITIES FRAUD—SELLER' CLAIM AGAINST PURCHASER

Plaintiff **claims damages from** defendant **and has the burden of proving each of three essential propositions:**

First, that [defendant] purchased a security from [plaintiff] in this state;

Second, that _____ purchased such security by
[defendant]
means of *[an untrue statement of a material fact] [or]*
[an omission to state a material fact necessary in order to make any statement made, in light of the circumstances under which it was made, not misleading];

**And third, that [plaintiff] did not know that [the state-
ment was untrue] [or] [that a material fact was
omitted].**

A fact or statement of fact is material if it was a substantial factor in influencing _____'s decision. It is not necessary, however, that it be the paramount or decisive factor, but only one that a reasonable person would attach importance to in making a decision.

[If you find from the evidence in this case that each of these propositions has been proved, then your verdict should be for _____ but if, on the other hand, you find from the evidence that any of these propositions has not been proved, then your verdict

should be for _____].
[defendant]

NOTE ON USE

Do not use the final bracketed paragraph when the case is submitted on interrogatories.

COMMENT

This instruction is based on Ark. Code Ann. § 23-42-106(b)(1).

For a general discussion of the Arkansas Securities Act, see Comment to AMI 2700.

Research References

West's Key Number Digest
Securities Regulation ¶309

Legal Encyclopedias
C.J.S., Securities Regulation and Commodity Futures Trading Regulation §§ 544 to 552, 561 to 562

AMI 2702

DEFENSES—SECURITIES FRAUD

As a defense to the claim of _____, _____
[plaintiff] [defendant]
contends and has the burden of proving:

A. That _____ did not know, and in the exercise
[defendant]
of reasonable care could not have known, of the
untruth or omission [or]

B. That _____ received a written offer before
[plaintiff]
suit to refund the total amount paid together with
interest at six percent (6%) per year from the date of
payment less the amount of any income received on
the security, and that [_____ failed to accept the offer
[plaintiff]
within thirty (30) days of its receipt] [_____ did not
[plaintiff]
reject the offer in writing within thirty (30) days of its
receipt] [or]

C. That _____ in connection with the transaction
[plaintiff]
at issue engaged in the performance of any contract
in violation of a [statute] [rule] [or] [and] [order] [or]
[that _____ acquired any purported right under any
[plaintiff]
such contract with knowledge of the facts by reason
of which the contract's making or performance was in
violation of a (statute) (rule) (or) (and) (order)].

[If you find from the evidence in this case that
_____ has proved each of the [three] [four] proposi-
[plaintiff]
tions essential to [his][her][its] claim, and that _____
[defendant]
has failed to prove the contention(s) supporting
[his][her][its] defense, then your verdict should be for

_____ ; but if, on the other hand, you find from the ev-
 [plaintiff]
 idence that any of the [three] [four] propositions has
 not been proved by _____ or that _____ has proved a
 [plaintiff] [defendant]
 contention supporting [his][her][its] defense, then
 your verdict should be for _____.]
 [defendant]

NOTE ON USE

If used, this instruction should immediately follow either AMI 2700 or 2701, and the last bracketed paragraph of that instruction should be omitted. Use the bracketed "four" if AMI 2700 is used, and use the bracketed "three" if AMI 2701 is used.

Use Paragraphs A, B, or C or the appropriate combination, according to the contentions and evidence in the case. If Paragraph B is utilized, include the first bracketed phrase if plaintiff owns the security and the second bracketed phrase if plaintiff no longer owns the security.

Do not use the last bracketed paragraph if the case is submitted on interrogatories.

COMMENT

This instruction is based on Ark. Code Ann. § 23-42-106(a)(1)(B), (b)(1), (f), and (g).

Research References

West's Key Number Digest
 Securities Regulation ⇨ 309

Legal Encyclopedias

C.J.S., Securities Regulation and Commodity Futures Trading Regulation §§ 544 to 552, 561 to 562

AMI 2703

DEFINITIONS—SECURITIES FRAUD

A security is considered to have been *[sold]* *[purchased]* in this state, whether or not either party is present in this state:

[when the offer that results in the transaction originates from this state] [or]

[when the offer is directed by the offeror to this state and received at the place to which it is directed or at any post office in this state in the case of a mailed offer] [or]

[when an offer to buy or to sell is accepted in this state. An offer is accepted in this state when acceptance is communicated to the offeror in this state and has not previously been communicated to the offeror, orally or in writing, outside this state. Acceptance is communicated to the offeror in this state, whether or not either party is then present in this state, when the offeree directs it to the offeror in this state, reasonably believing the offeror to be in this state, and it is received at the place to which it is directed or at any post office in this state in the case of a mailed acceptance].

NOTE ON USE

Use this instruction only when a question of fact arises as to whether the purchase or sale occurred in this state, and use only the bracketed paragraph or paragraphs that relate to the evidence in the case.

COMMENT

This instruction is based on Ark. Code Ann. § 23-42-103. This definition is set out as a separate instruction because the Committee believes the applicability of the statute will not give rise to a question of fact in the majority of cases.

Section 23-42-103(5) provides:

An offer to sell or to buy is not made in this state when:

(A) The publisher circulates, or there is circulated on his behalf, in this state any bona fide newspaper or other publication of general, regular, and paid circulation which is not published in this state, or which is published in this state but has had more than two-thirds ($\frac{2}{3}$) of its circulation outside this state during the past twelve (12) months; or

(B) A radio or television program originating outside this state is received in this state.

If a case involves an issue of fact regarding these exclusions, this instruction should be modified accordingly.

As to whether an underlying instrument involved in the transaction is properly denominated a "security," see discussion in Comment to AMI 2700.

Research References

West's Key Number Digest
Securities Regulation ¶309

Legal Encyclopedias
C.J.S., Securities Regulation and Commodity Futures Trading Regulation §§ 544 to 552, 561 to 562

AMI 2704

ISSUES—IMPUTED LIABILITY—SECURITIES
FRAUD

 [also] seeks damages from because
[Plaintiff] *acted as a broker-dealer or agent* [defendant]
of *[his][her][its]* role in the transaction, and,

First, must prove all the essential propositions
necessary for a verdict against ;
[seller] [purchaser];

And second, must prove that *[(controlled)*
[defendant]
*(was a partner, officer, or director of) (occupied the
status or performed the function of partner, officer, or
director of) the (seller) (purchaser) in the transac-
tion(s) at issue] [(was an employee who materially
aided in the transaction) (was a broker-dealer or agent
who materially aided in the transaction) at issue].*

[A person “materially aided” in a transaction
when *[his][her][its]* act(s) *[is] [are]* a substantial factor
in the transaction. *[His][Her][Its]* act(s) did not have to
be the paramount or decisive factor, but only impor-
tant to the completion of the transaction.]

[If you find from the evidence in this case that
 has proved each of the propositions essential
[plaintiff]
to *[his][her][its]* claim, then your verdict should be for
 .]
[plaintiff]

NOTE ON USE

Use AMI 701 with this instruction if the defendant is claimed to be
an agent or employee.

Do not use the last bracketed paragraph if the case is submitted on
interrogatories.

COMMENT

This instruction is based on Ark. Code Ann. § 23-42-106(c).

The definition of “materially aided” is derived from AMI 402. Arkansas cases on this issue turn on their unique facts and provide no definition to the term. *See Hogg v. Jerry*, 299 Ark. 283, 773 S.W.2d 84 (1989); *Quick v. Woody*, 295 Ark. 168, 747 S.W.2d 108 (1988); *Titan Oil and Gas, Inc. v. Shipley*, 257 Ark. 278, 517 S.W.2d 210 (1974); *Bristow v. Mourot*, 99 Ark. App. 386, 260 S.W.3d 733 (2007). *See also Benton v. Merrill Lynch & Co.*, 524 F.3d 866 (8th Cir. 2008) (determining that “materially aided” depends on a fact-based inquiry). The formulation is consistent with authority in other jurisdictions with substantially identical statutory language. *See Prince v. Brydon*, 764 P.2d 1370 (Or. 1988).

In *First Arkansas Bank & Trust v. Gill Elrod Ragon Owen & Sherman, P.A.*, bond counsel acting strictly in the role of bond counsel was not liable as a seller, control person, or agent with respect to the sale of securities. 2013 Ark. 159, at 6–8.

Research References

West's Key Number Digest
Securities Regulation ⇨309

Legal Encyclopedias
C.J.S., Securities Regulation and Commodity Futures Trading Regulation §§ 544 to 552, 561 to 562

AMI 2705

DEFENSE—IMPUTED LIABILITY—SECURITIES
FRAUD

As a defense, _____ [defendant] contends and has the burden of proving that [he][she] did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist.

[If you find from the evidence in this case that _____ [plaintiff] has proved each of the propositions essential to [his][her][its] claim and that _____ [defendant] has failed to prove the contention supporting [his][her][its] defense, then your verdict should be for _____ [plaintiff]; but if, on the other hand, you find from the evidence that any of the essential propositions has not been proved by _____ [plaintiff] or that _____ [defendant] has proved the proposition supporting [his][her][its] defense, then your verdict should be for _____ [defendant].]

NOTE ON USE

If used, this instruction should immediately follow AMI 2704, and the last bracketed paragraph of that instruction should be omitted.

COMMENT

This instruction is based on Ark. Code Ann. § 23-42-106(c).

Research References

West's Key Number Digest
Securities Regulation ¶309

Legal Encyclopedias
C.J.S., Securities Regulation and Commodity Futures Trading Regulation §§ 544 to 552, 561 to 562

AMI 2706

MEASURE OF DAMAGES—SECURITIES FRAUD

[If you decide for _____ on the question of liability
[plaintiff]
(against any party [he][she][it] is suing),] [If an inter-
rogatory requires you to assess the damages of _____
[plain
tiff],] you must then fix the amount of money [he][s-
he][it] may recover according to the following formula:

A. The total amount paid for the security, to-
gether with interest at six percent (6%) per year from
the date of payment [less the amount of any income
received on the security] [and less the value of the
security when _____ disposed of it].
[plaintiff]

B. The value of the security sold [plus any
income or other distributions in cash or the value of
such income or distribution if made in a form other
than cash], together with interest at six percent (6%)
per year from the date of transfer [less the amount
received when the security was sold].

NOTE ON USE

This instruction should be used only if there is a factual dispute concerning the calculation of damages.

Paragraph A should be used when a purchaser is the plaintiff. Use the second bracketed language only if plaintiff no longer owns the security.

Paragraph B should be used when a seller is the plaintiff.

COMMENT

This instruction is based on Ark. Code Ann. § 23-42-106(a)(1) and (b)(1). Damages may be for out-of-pocket losses or for the benefit of the bargain. See AMI 2442. That portion of the Arkansas statute that provides that a buyer of an unregistered security can recover from the

seller the consideration paid for the security, together with interest at six percent, costs, and reasonable attorney fees, less the amount of income received on the security, upon tender of the security, sets forth a calculation of damages designed to restore the plaintiff to the position he held before he entered into the wrongful transaction. *Peacock v. 21st Century Wireless Group, Inc.*, 285 F.3d 1079 (8th Cir. 2002). *See also* *Rooney v. Williamson*, 167 F.3d 1185 (8th Cir. 1999) (remanding case for a recomputation of interest owed to defendant seller after determining that, upon rescission of sale of securities that was unlawful under Arkansas law, offset against plaintiff purchaser's recovery by amount that purchaser received, during his ownership of stock, as credit against loan he took out to buy stock, should have been taken into account in calculating amount of prejudgment interest). A successful plaintiff may also recover reasonable attorney fees in addition to "costs." *See Peacock*, 285 F.3d at 1086 (determining that the trial court did not abuse its discretion by awarding only 15% of attorney fees requested by owners of company in a case in which the owners sued a corporation with which they had entered into a stock-swap agreement based on the court's calculation that only 15% of attorneys' time had been spent on successful failure to register claim, while most of the attorneys' time had been spent on the unsuccessful breach of contract and fraud claims).

Research References

West's Key Number Digest
Securities Regulation §309

Legal Encyclopedias
C.J.S., Securities Regulation and Commodity Futures Trading Regulation §§ 544 to 552, 561 to 562

CHAPTER 28

FRANCHISE PRACTICES ACT

Table of Instructions

AMI

- 2800. Issues—Claim for Damages Based on Termination, Cancellation or Failure to Renew Franchise.
- 2801. Definition—Franchise.
- 2802. Definition—Good Cause.
- 2803. Definitions—Franchisor, Franchisee, Person.
- 2804. Definition—Good Faith.
- 2805. Issues—Claim for Damages Based on Unlawful Practices of Franchisors.
- 2806. Issues—Claim for Damages Based on Misleading and Fraudulent Schemes in Sale or Purchase of Franchise.
- 2807. Definitions—Sale, Transfer, or Assignment.

AMI 2800

ISSUES—CLAIM FOR DAMAGES BASED ON TERMINATION, CANCELLATION OR FAILURE TO RENEW FRANCHISE

 claims damages from and has the
[Plaintiff] [defendant]
burden of proving each of six essential propositions:

First, that *[he][she][it]* sustained damages;

Second, that granted a franchise to ;
[defendant] [plaintiff]

Third, that the performance of the franchise contemplated or required _____ to establish or maintain a place of business in the State of Arkansas;

Fourth, that _____ *[terminated] [cancelled] [failed to renew]* the franchise;

Fifth, *[that the (termination) (cancellation) (or) (failure to renew) was without good cause] [or] [that the failure to renew was not in accordance with the current policies, practices, and standards established by (defendant), which in their establishment, operation, and application are not arbitrary or capricious];* and

Sixth, that the *[termination] [cancellation] [failure to renew]* was a proximate cause of _____'s damages.

[If you find from the evidence in this case that each of these propositions has been proved, then your verdict should be for _____; but if, on the other hand, you find from the evidence that any of these propositions has not been proved, then your verdict should be for _____.]

NOTE ON USE

Do not use the bracketed paragraph if the case is submitted on interrogatories.

COMMENT

This instruction is based on Ark. Code Ann. § 4-72-204(a). No instruction is provided concerning issues of notice or right to cure found in § 4-72-204(b), (d). If a case has such issues, an appropriate instruction should be prepared.

The Committee has not proposed a definition for the terms

"arbitrary" or "capricious" from Arkansas case law, because cases that use those terms were decided in the context of the review of administrative matters and usually used the words "arbitrary and capricious" as a term of art. If the court or practitioner believes a definition of those terms is necessary in a particular case, an appropriate instruction should be prepared.

Research References

West's Key Number Digest 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

AMI 2801

DEFINITION—FRANCHISE

When I use the word “franchise” in these instructions, I mean a written or oral agreement for a definite or indefinite period, in which a person grants to another person a license to use a trade name, trademark, service mark, or related characteristic within an exclusive or nonexclusive territory, or to sell or distribute goods or services within an exclusive or non-exclusive territory at wholesale, retail, by lease agreement, or otherwise.

NOTE ON USE

Use this instruction in conjunction with AMI 2800.

COMMENT

This instruction is based on Ark. Code Ann. § 4-72-202(1)(A).

Section 4-72-202(1)(B) provides that a franchise is not created by a lease, license, or concession granted by a retailer to sell goods or furnish services on or from premises occupied by the retailer-grantor primarily for its own merchandising activities, and a franchise is not created by door-to-door sales complying with Ark. Code Ann. §§ 4-89-101 et seq. If a case involves an issue of fact regarding these issues, this instruction should be modified accordingly.

The Arkansas Franchise Practices Act is inapplicable to a relationship limited by contract to solicitation and procurement of applications for insurance. *Stockton v. Sentry Ins.*, 337 Ark. 507, 989 S.W.2d 914 (1999). The authority to give final, unqualified approval of an order or sale, rather than just to enter into a temporary binder, is critical to determining that an agent is a franchisee under the Act. *Gunn v. Farmers Ins. Exch.*, 2010 Ark. 434.

The Act is also inapplicable where the agreement between the parties did not contemplate the establishment of a fixed place of business as that term is defined in Ark. Code Ann. § 4-72-202(6). *Mary Kay, Inc. v. Isbell*, 338 Ark. 556, 999 S.W.2d 669 (1999).

The applicability of the Act is often the subject of a motion to dismiss or motion for summary judgment. *See Mary Kay, Inc. v. Isbell, supra.*

Research References

West's Key Number Digest

Antitrust and Trade Regulation §280 to 297, 350 to 369

AMI 2802

DEFINITION—GOOD CAUSE

When I use the words “good cause” in these instructions, I mean the following:

[(1) Failure by a franchisee to comply substantially with the requirements imposed, or sought to be imposed, upon *[him][her][it]* by the franchisor, provided the requirements are not discriminatory as compared with the requirements imposed on other similarly situated franchisees, either as stated or as enforced;] *[or]*

[(2) Failure by the franchisee to act in good faith and in a commercially reasonable manner in carrying out the terms of the franchise;] *[or]*

[(3) Voluntary abandonment of the franchise;] *[or]*

[(4) Conviction of the franchisee of an offense substantially related to the business conducted pursuant to the franchise that was punishable by a term of imprisonment in excess of one (1) year;] *[or]*

[(5) Any act by a franchisee that substantially impairs the franchisor’s trademark or trade name;] *[or]*

[(6) Institution of insolvency or bankruptcy proceedings by or against a franchisee, or any assignment or attempted assignment by a franchisee of the franchise or the assets of the franchise for the benefit of the creditors;] *[or]*

[(7) Loss of the _____'s right to occupy
[franchisor/franchisee]
the premises from which the franchise business is
operated;] [or]

[(8) Failure of the franchisee to pay to the
franchisor within ten (10) days after receipt of notice
of any sums past due the franchisor and relating to
the franchise.]

NOTE ON USE

Use this instruction in conjunction with AMI 2800. Use only those elements that are justified by the evidence.

COMMENT

This instruction is based on Ark. Code Ann. § 4-72-202(7). In a case involving the question whether the market withdrawal of a product or of a trademark constitutes “good cause” to terminate a franchise under Ark. Code Ann. § 4-72-204(a)(1), the Arkansas Supreme Court, reciting the principle of statutory construction *expressio unius est exclusio alterius*, concluded that the statutory list is an exclusive one. *Larry Hobbs Farm Equip., Inc. v. CNH Am., LLC*, 375 Ark. 379, 385, 294 S.W.3d 190, 195 (2009). The court also found persuasive the Fourth Circuit’s earlier interpretation of Ark. Code Ann. § 4-72-202(7) in *Volvo Trademark Holding Aktiebolaget v. Clark Mach. Co.*, 510 F.3d 474, 482-83 (4th Cir. 2007), as setting forth the exclusive means by which a franchisor can terminate a franchise for “good cause.” The court declined to address the question whether this interpretation raised constitutional concerns under the dormant Commerce Clause principle, an issue considered at length in the *Volvo* case. The court in *Larry Hobbs Farm Equip., Inc.*, *supra*, also rejected two claims under the Farm Equipment Retailer Franchise Protection Act, Ark. Code Ann. § 4-72-301 et seq., for which there currently are no model jury instructions.

Research References

West’s Key Number Digest
Antitrust and Trade Regulation ¶280 to 297, 350 to 369

AMI 2803

**DEFINITIONS—FRANCHISOR, FRANCHISEE,
PERSON**

When I use the word “franchisor” in these instructions, I mean a person who grants a franchise to another person.

When I use the word “franchisee” in these instructions, I mean a person to whom a franchise is offered or granted.

When I use the word “person” in these instructions, I mean a natural person, corporation, partnership, trust, or other entity and, in the case of any entity, “person” shall include any other entity that has a majority interest in such entity or effectively controls such other entity, as well as the individual officers, directors, and other persons in active control of the activities of each entity.

NOTE ON USE

Use this instruction when the terms “franchisor,” “franchisee,” and “person” in Ark. Code Ann. § 4-72-202(2), (3), and (4) are used in other instructions.

COMMENT

This instruction is based on Ark. Code Ann. § 4-72-202(2), (3), and (4).

Research References

West's Key Number Digest
Antitrust and Trade Regulation ¶280 to 297, 350 to 369

AMI 2804

DEFINITION—GOOD FAITH

When I use the words “good faith” in these instructions, I mean honesty in fact in the conduct or transaction concerned.

NOTE ON USE

Use this instruction when another instruction uses the term “good faith.”

COMMENT

This instruction is based on Ark. Code Ann. § 4-72-202(8).

Research References

West's Key Number Digest
Antitrust and Trade Regulation ¶280 to 297, 350 to 369

AMI 2805

**ISSUES—CLAIM FOR DAMAGES BASED ON
UNLAWFUL PRACTICES OF FRANCHISORS**

**[Plaintiff] claims damages from [defendant] and has the
burden of proving five essential propositions:**

First, that [plaintiff] sustained damages;

Second, that [defendant] granted a franchise to [plaintiff];

**Third, that the performance of the franchise
contemplated or required [plaintiff] to establish or
maintain a place of business in the State of Arkansas;**

**Fourth, that [defendant] or [defendant]'s officer or em-
ployee, directly or indirectly,**

**[(1) prohibited the right of free association among
[plaintiff] and other franchisees for any lawful
purpose;] [or]**

**[(2) required or prohibited any change in manage-
ment of [plaintiff] unless the requirement or prohibi-
tion of change was for reasonable cause, which
cause was stated in writing by [defendant];] [or]**

**[(3) restricted the sale of any equity or debenture
issue or the transfer of any security of a franchi-
see or in any way prevented or attempted to
prevent the transfer, sale, or issuance of shares
of stock or debentures to employees, personnel
of the franchisee, or heirs of the principal owner,**

provided the basic financial requirements of the franchisor are complied with, if the sale, transfer, or issuance does not have the effect of accomplishing a sale of the franchise;] [or]

[(4) provided any term or condition in any lease or other agreement related to a franchise, which term or condition directly or indirectly violates any provision of Arkansas franchise law on which I have instructed you;] [or]

[(5) refused to deal with _____ in a commercially reasonable manner and in good faith;] [or]

[(6) collected a percentage of _____'s sales as an advertising fee but did not use the funds for the purpose of advertising the business conducted by _____;] and
[plaintiff]

Fifth, that _____'s conduct was a proximate cause of _____'s damages.
[defendant]
[plaintiff]

[If you find from the evidence in this case that each of these propositions has been proved, then your verdict should be for _____; but if, on the other hand, you find from the evidence that any of these propositions has not been proved, then your verdict should be for _____.]
[plaintiff]
[defendant]

NOTE ON USE

In the fourth element, use those bracketed provisions that are justified by the evidence.

Do not use the final bracketed paragraph if the case is submitted on interrogatories.

COMMENT

This instruction is based on Ark. Code Ann. § 4-72-206. No instruction has been prepared for § 4-72-206(1), which makes it an unlawful practice “[t]o require a franchisee at [the] time of entering into a franchise arrangement to assent to a release, assignment, novation, waiver, or estoppel which would relieve any person from liability imposed by this chapter.” The Committee believes this provision could be the basis of a claim for damages. However, it would ordinarily operate to negate a defense by a franchisor. In the event there is a fact issue related to this provision, the practitioner should prepare an appropriate instruction.

The Committee has not proposed a definition of “commercially reasonable.” In *Miller Brewing Co. v. Ed Roleson, Jr., Inc.*, 365 Ark. 38, 45, 223 S.W.3d 806, 812 (2006), the Supreme Court noted that the Arkansas Franchise Practices Act does not define “commercially reasonable manner” and opted not to offer its own definition of the term. Instead, the court held that “whether (franchisor) dealt with the franchisee in a commercially reasonable manner and in good faith is a fact question for the jury.” The Committee notes that even in the context of the Uniform Commercial Code, courts have noted that commercial reasonableness “is a flexible concept.” See, e.g., *Marks v. Powell*, 162 B.R. 820, 829 (E.D. Ark. 1993).

Research References*West's Key Number Digest*

Antitrust and Trade Regulation §280 to 297, 350 to 369

AMI 2806

**ISSUES—CLAIM FOR DAMAGES BASED ON
MISLEADING AND FRAUDULENT SCHEMES IN
SALE OR PURCHASE OF FRANCHISE**

 claims damages from and has the
[Plaintiff] [defendant]
burden of proving each of six essential propositions:

First, that sustained damages;
[plaintiff]

Second, that granted a franchise to ;
[defendant] [plaintiff]

Third, that the performance of the franchise
contemplated or required to establish or
[Plaintiff]
maintain a place of business in the State of Arkansas;

Fourth, that, directly or indirectly, in connection
with the (offer) (sale) (purchase) (transfer) (or) (as-
signment) of a franchise, knowingly
[defendant]

[employed a device, scheme or artifice with the
intent of defrauding]; [or]
[plaintiff]

*[(made an untrue statement of a material fact) (or)
(omitted to state a material fact necessary in or-
der to make the statements made, in light of the
circumstances under which they were made, not
misleading);] [or]*

[engaged in an act, practice, or course of busi-
ness that operated as a fraud or deceit upon
];
[plaintiff]

Fifth, that _____ justifiably relied upon _____'s
[plaintiff] [defendant]
conduct; and

Sixth, that _____'s conduct was a proximate
[defendant]
cause of _____'s damages.
[plaintiff]

[A fact or statement of fact is material if it was a substantial factor in influencing _____'s decision. It is
[plaintiff]
not necessary, however, that it be the paramount or decisive factor, but only one that a reasonable person would attach importance to in making a decision.]

NOTE ON USE

The fourth element should include those bracketed and parenthetical provisions that are justified by the evidence. If more than one of the bracketed provisions is used, the provision(s) preceding it should be followed by the word "or." The final bracketed paragraph concerning materiality should only be used if the second of the three bracketed alternatives in the fourth element is used.

COMMENT

This instruction is based on Ark. Code Ann. § 4-72-207. Other instructions may be appropriate for use with this instruction. *See, e.g., O'MALLEY, GRENIG AND LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS* ch. 162 (6th ed.); *FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS—CIVIL*, § 7.1 (West 1999), which include related instructions for federal securities claims based upon statutes with similar language. However, because Arkansas authority concerning this statute is sparse, the Committee elected to prepare only an instruction that provides the elements of the cause of action and a related instruction (AMI 2807), which defines the terms "sale," "transfer," and "assignment."

The Committee has included justifiable reliance as an essential element of this claim. Although Ark. Code Ann. § 4-72-207 does not expressly state such an element, the Committee notes that the remedies of § 4-72-208 apply to any franchisee "who is harmed by a violation or violations of § 4-72-207." When viewed in light of authority from other states that holds reliance is an essential element in franchise claims, *see, e.g., Hardee's of Maumelle, Ark., Inc. v. Hardee's Food Systems, Inc.*, 31 F.3d 573 (7th Cir. 1994), the Committee believes the remedies

provision supports the decision to include reliance as an element of this claim. *See also* Morrison v. Back Yard Burgers, Inc., 91 F.3d 1184 (8th Cir. 1996) (discussing the traditional elements of fraud in connection with a franchise claim).

Research References

West's Key Number Digest Antitrust and Trade Regulation §280 to 297, 350 to 369

AMI 2807

**DEFINITIONS—SALE, TRANSFER, OR
ASSIGNMENT**

When I use the words “sale,” “transfer,” “assignment,” or variations of those words in these instructions, I mean any disposition of a franchise or any interest therein, with or without consideration, to include, but not be limited to, bequests, inheritance, gift, exchange, lease, or license.

NOTE ON USE

Use this instruction in conjunction with AMI 2806.

COMMENT

This instruction is based on Ark. Code Ann. § 4-72-202(5).

Research References

West's Key Number Digest
Antitrust and Trade Regulation ⇨ 280 to 297, 350 to 369

CHAPTER 29

DECEPTIVE TRADE PRACTICES

Table of Instructions

AMI

2900. Issues—Claim for Damages Based on Deceptive Trade Practices.
2901. Definitions—Deceptive Trade Practices.
2902. Issues—Claim for Damages Based on Deception, Fraud, or False Pretense and Concealment, Suppression, or Omission of Material Facts in Sale Transaction.
2903. Issues—Imputed Liability—Deceptive Trade Practices.

AMI 2900

ISSUES—CLAIM FOR DAMAGES BASED ON DECEPTIVE TRADE PRACTICES

**_____ claims damages from _____ and has the
[Plaintiff] [defendant]
burden of proving each of three essential
propositions:**

**First, that (he) (she) has sustained actual financial
loss;**

**Second, that _____ [knowingly made a false rep-
[defendant]
resentation as to (the characteristics, ingredients,
uses, benefits, alteration, source, sponsorship, ap-
proval, or certification of goods or services) (or
(whether goods are original or new, or of a particular
standard, quality, grade, style, or model);] [or]**

[disparaged the goods, services, or business of _____
[plaintiff]
by a false or misleading representation of fact;] [or]
[advertised goods or services with the intent not to
sell them as advertised;] [or]

[refused (to provide requested relevant information to
_____ about) (or) (to deliver to _____) the record of
[plaintiff] [plaintiff]
warranty and statement of service availability included
in the original container of an electronic or mechanical
product;] [or]

[used bait-and-switch advertising;] [or]

[knowingly failed to inform _____ that goods were
[plaintiff]
damaged by flood, water, fire, or accident;] [or]

[made a false representation to _____ that contribu-
[plaintiff]
tions solicited for charitable purposes would be spent
in a specific manner or for specific purposes;] [or]

[knowingly took advantage of _____, who was reason-
[plaintiff]
ably unable to protect (*his*)*her* interest because of
physical infirmity, ignorance, illiteracy, inability to
understand the language of an agreement, or a similar
reason;] [or]

[offered a trust document for sale, assembly, or drafting;] [or]

[displayed or caused to be displayed a fictitious or
misleading name or telephone number on an Arkansas
resident's telephone caller identification service;]
[or]

[engaged in an unconscionable, false, or deceptive
act or practice in business, commerce, or trade;] and

Third, that *[his or her]* actual financial loss was proximately caused by his or her reliance on the defendant's conduct described above.

[If you find from the evidence in this case that each of these propositions has been provided, then your verdict should be for _____; but if, on the other
[plaintiff]
hand, you find from the evidence that any of these propositions has not been proved, then your verdict should be for _____.]
[defendant]

“Actual financial loss” means an ascertainable amount of money that is equal to the amount paid by a person for goods or services and the actual market value of the goods of services provided to a person.

NOTE ON USE

Do not use the final bracketed paragraph if the case is submitted on interrogatories.

COMMENT

This instruction is based on the Arkansas Deceptive Trade Practices Act (“ADTPA”), specifically, Ark. Code Ann. § 4-88-107, which sets out prohibited deceptive and unconscionable trade practices, and Ark. Code Ann. § 4-88-113(f), which provides for a private cause of action to recover damages.

The Arkansas Supreme Court, in *Air Evac EMS, Inc. v. USABLE Mutual Insurance Company d/b/a Arkansas Blue Cross Blue Shield*, 2017 Ark. 368, 533 S.W.3d 572, has further interpreted the safe harbor provision of the ADTPA set forth at Ark. Code Ann. § 4-88-101 concluding that Arkansas follows the specific-conduct rule “meaning that [the ADTPA] precludes claims only when the actions or transactions at issue have been specifically permitted or authorized under laws administered by a state or federal regulatory body or officer.” *Id.* at 575–76; *See also* *DePriest v. AstraZeneca Pharmaceuticals, L.P.*, 2009 Ark. 547, at 13–15. (The ADTPA does not apply to advertising or practices that are subject to and comply with any rule, order, or statute administered by the Federal Trade Commission or actions or transactions “specifically permitted” under laws administered by a regulatory body or officer acting under statutory authority of this state or the United States.)

Act 986 replaced "actual damage or injury" with "actual financial loss."

Business entities and other non-consumers, as well as individuals, may bring claims under the ADTPA. Ark. Code Ann. § 4-88-102(5); *Vanoven v. Chesapeake Energy Corp.*, No. 4:10CV0158 BSM, 2011 WL 1042251, at *5 (E.D. Ark. Mar. 22, 2011); *ElectroCraft Arkansas, Inc. v. Super Electric Motors, Ltd.*, 70 U.C.C. Rep. Serv. 2d 716, at *20-23 (E.D. Ark. 2009).

There is no private cause of action for injunctive relief under the ADTPA. *Baptist Health v. Murphy*, 2010 Ark. 358, at 27-29 (citing *Wallis v. Ford Motor Co.*, 362 Ark. 317, 208 S.W.3d 153 (2005)).

The ADTPA does not apply to the practice of law by licensed attorneys. *Born v. Hosto & Buchan, PLLC*, 2010 Ark. 292, at 14-15 (citing *Preston v. Stoops*, 373 Ark. 591, 594, 285 S.W.3d 606, 609 (2008)). This is true even if the attorney is licensed by, and located in, another state and is engaged in the collection of debts inside this state. *Boyajian v. State*, 2012 Ark. 210, at 3. However, in *Campbell v. Asbury Automotive, Inc.*, the Arkansas Supreme Court held that the ADTPA can apply to a cause of action for the unauthorized practice of law by a nonlawyer. 2011 Ark. 157, at 10-11.

Section 4-88-107(a)(10), which prohibits "any other unconscionable, false, or deceptive act or practice," is not too vague for enforcement. *State ex rel. Bryant v. R & A Inv. Co.*, 336 Ark. 289, 295, 985 S.W.2d 299, 302 (1999).

While the ADTPA "protects consumers from unfair ways of doing business," the alleged prohibited conduct must be considered in light of trade practices. *Independence Cnty. v. Pfizer, Inc.*, 534 F. Supp. 2d 882, 887-88 (E.D. Ark. 2008), *aff'd*, 552 F.3d 659 (8th Cir. 2009) (dismissing on the pleadings ADTPA claims against drug manufacturing companies involved in manufacture or distribution of over-the-counter products containing ephedrine or pseudoephedrine based on theory that they knew their products were being used in illegal manufacture of methamphetamine). Nothing in the Act protects consumers against third party criminal conduct. *Id.*

Research References

West's Key Number Digest

Antitrust and Trade Regulation §131, 132, 286, 363, 364

Legal Encyclopedias

C.J.S., Credit Reporting Agencies; Consumer Protection §§ 40, 115

AMI 2901

DEFINITIONS—DECEPTIVE TRADE PRACTICES

When I use the word “contribution” in these instructions, I mean the promise or grant of any money or property of any kind or value.

When I use the word “person” in these instructions, I mean an individual, organization, group, association, partnership, corporation, or any combination of them.

When I use the word “solicitation” in these instructions, I mean each request for a contribution.

When I use the word “goods” in these instructions, I mean any tangible property, coupons, or certificates, whether bought or leased.

When I use the word “services” in these instructions, I mean work, labor, or other things purchased that do not have physical characteristics.

When I use the words “bait-and-switch advertising” in these instructions, I mean advertising consisting of an attractive but insincere offer to sell a product or service that the seller in truth does not intend or desire to sell, evidenced by refusal to show or disparagement of the advertised product, the requirement of a tie-in sale or other undisclosed conditions precedent to the purchase, demonstrating a defective product, or other acts demonstrating an intent not to sell the advertised product or services.

When I use the words “actual financial loss” in these instructions, I mean an ascertainable amount of money that is equal to the difference between the amount paid by a person for goods or services and

the actual market value of the goods or services provided to a person.

NOTE ON USE

Use this instruction, or the applicable part, in conjunction with other instructions, as necessary.

COMMENT

This instruction is based on Ark. Code Ann. §§ 4-88-102, 4-88-105(c), and 4-88-107(a)(5).

The phrase “actual financial loss” and its definition were added by Act 986 of 2017. See the Comment to AMI 2900 for a discussion of Act 986 and its impact on the ADTPA.

Business entities and other non-consumers, as well as individuals, may bring claims under the Act. Ark. Code Ann. § 4-88-102(5); *Vanoven v. Chesapeake Energy Corp.*, 2011 WL 1042251 (E.D. Ark. 2011); *Electro-Craft Arkansas, Inc. v. Super Electric Motors, Ltd.*, 70 U.C.C. Rep. Serv. 2d 716 (E.D. Ark. 2009).

Research References

West's Key Number Digest
Antitrust and Trade Regulation ¶131, 132, 286, 363, 364

Legal Encyclopedias
C.J.S., Credit Reporting Agencies; Consumer Protection §§ 40, 115

AMI 2902

**ISSUES—CLAIM FOR DAMAGES BASED ON
DECEPTION, FRAUD, OR FALSE PRETENSE AND
CONCEALMENT, SUPPRESSION, OR OMISSION OF
MATERIAL FACTS IN SALES TRANSACTION**

_____ claims damages from _____ and has the
[Plaintiff] [defendant]
burden of proving each of three [four] essential
propositions:

First, that (he) (she) has sustained actual financial
loss;

Second, that _____ (used a deception, fraud, or
[defendant]
false pretense) (or) (concealed, suppressed, or omit-
ted a material fact) in connection with the sale or
advertisement of goods, services, or a charitable so-
licitation; (and)

[Third, that _____ intended that others rely upon
[defendant]
the concealment, suppression, or omission; and]

[Third] [Fourth], that [his or her]'s actual financial
loss was proximately caused by his or her reliance on
the defendant's conduct described above.

[If you find from the evidence in this case that
each of these propositions has been proved, then
your verdict should be for _____; but if, on the other
[plaintiff]
hand, you find from the evidence that any of these
propositions has not been proved, then your verdict
should be for _____.]

[defendant]

NOTE ON USE

Use the first bracketed paragraph as the third proposition if the

cause of action is based on the concealment, suppression, or omission of a material fact. Do not use the final bracketed paragraph if the case is submitted on interrogatories.

COMMENT

This instruction is based on Ark. Code Ann. §§ 4-88-107 and 108.

Refer to the Comment to AMI 2900 for a discussion of Act 986 of 2017 and its substantive modifications to the ADTPA.

Research References

West's Key Number Digest
Antitrust and Trade Regulation ¶131, 132, 286, 363, 364

Legal Encyclopedias
C.J.S., Credit Reporting Agencies; Consumer Protection §§ 40, 115

AMI 2903

ISSUES—IMPUTED LIABILITY—DECEPTIVE
TRADE PRACTICES

 [also] seeks damages from , and
 (Plaintiff) (defendant)
 has the burden of proving the following three essential propositions:

First, that all the essential propositions exist *[for a verdict against] [to prove a deceptive trade practice by]* ;
 (person committing deceptive trade practice)

Second, that *[directly or indirectly controlled] [or] [was a (partner), (officer), (or) (director) of]* ; and
 (defendant) (person committing deceptive trade practice)

Third, that knew or reasonably should
 (defendant)
 have known of the existence of the facts by reason of which 's *[liability] [deceptive trade practice]* exists.
 (person committing deceptive trade practice)

[If you find from the evidence in this case that each of these propositions has been proved, then your verdict should be for ; but if, on the other hand, you find from the evidence that any of these propositions has not been proved, then your verdict should be for .]
 (plaintiff) (defendant)

 NOTE ON USE

Use the bracketed word "also" if the person committing the deceptive trade practice is a defendant in the suit. In the first and third propositions, use the first bracketed portions if the person committing the deceptive trade practice is a defendant in the suit.

If the person committing the deceptive trade practice is not a defendant, use AMI 2900 as the basis for instructing the jury as to the essential propositions to prove a deceptive trade practice. This may be accomplished by a separate instruction or by modifying the first proposition of this instruction to include the essential propositions of AMI 2900 that are applicable.

Do not use the bracketed paragraph if the case is submitted on interrogatories.

COMMENT

This instruction is based on Ark. Code Ann. § 4-88-113(d)(1). See AMI 2901 for the definition of the word "person" as used in connection with this instruction.

Research References

West's Key Number Digest
Antitrust and Trade Regulation §131, 132, 286, 363, 364

Legal Encyclopedias
C.J.S., Credit Reporting Agencies; Consumer Protection §§ 40, 115

CHAPTER 30

BANK DEPOSITS AND COLLECTIONS

Table of Instructions

AMI

- 3001. Issues—Claim for Damages Based on Bank's Improper Payment of Check(s).
- 3002. Measure of Damages—Failure to Exercise Ordinary Care.
- 3003. Defense—Failure to Promptly Notify—Loss Allocation.
- 3004. UCC Definition—Ordinary Care.
- 3005. UCC Definition—Good Faith.
- 3006. Negligence Contributing to Forged Signature or Alteration of Instrument.

AMI 3001

ISSUES—CLAIM FOR DAMAGES BASED ON BANK'S IMPROPER PAYMENT OF CHECK(S)

 claims damages from **and has the**
(Plaintiff) (defendant)
burden of proving each of three essential propositions:

First, that **permitted an unauthorized**
(defendant)
person to [cash] [deposit to his/her own account] [obtain the benefit of] the check(s);

Second, that **did not receive the benefit of**
(plaintiff)
the check(s);

And third, that **'s conduct in permitting the**
(defendant)

[cashing] [deposit] [obtaining of the benefit of] the check(s) was a proximate cause of _____'s damages.
(plaintiff)

[If you find from the evidence in this case that each of these propositions has been proved, then your verdict should be for _____; but if, on the other hand, you find from the evidence that any of these propositions has not been proved, then your verdict should be for _____.]
(defendant)

NOTE ON USE

Use this instruction when a customer claims a bank improperly paid a check in violation of a provision of the Uniform Commercial Code. If a provision of the Uniform Commercial Code requires the customer to prove additional facts as essential elements of a claim, this instruction should be modified.

Use AMI 3002 (measure of damages) with this instruction.

If the court determines that either Ark. Code Ann. § 4-4-406 or § 4-3-406 is applicable, use AMI 3003 (stating the defense of Ark. Code Ann. § 4-4-406) and/or AMI 3006 (stating the defense of Ark. Code Ann. § 4-3-406) with this instruction.

Do not use the bracketed paragraph when the case is submitted on interrogatories. In addition, do not use the bracketed paragraph when the comparative fault provisions of Ark. Code Ann. §§ 4-4-406 or 4-3-406 apply.

COMMENT

This instruction is based on Ark. Code Ann. §§ 4-3-301, 4-3-403, 4-3-420 and 4-4-406. If there is an issue of fact whether the plaintiff has standing (i.e., is the holder, the payee, the intended beneficiary, or the person entitled to enforce the check), the instruction may need to be modified to add a new first element that addresses that issue. See Comment to Ark. Code Ann. § 4-3-301 and Comment 1 to Ark. Code Ann. § 4-3-420.

With the exception of a bank's responsibility for lack of good faith or failure to exercise ordinary care, the provisions of Article 4 of the Uniform Commercial Code may be varied by agreement. Additionally,

the parties may determine by agreement the standards by which the bank's responsibility is to be measured if those standards are not manifestly unreasonable. Ark. Code Ann. § 4-4-103(a). As to the application and effect of Federal Reserve regulations, operating circulars, and clearinghouse rules, see Ark. Code Ann. § 4-4-103(b) and (c) and Comment 3 to Ark. Code Ann. § 4-4-103.

There may be fact issues as to whether a signature or endorsement was authorized. For example, more than one signature may be required. See Comment 4 to Ark. Code Ann. § 4-4-103. If the jury needs guidance on these issues, an additional instruction should be prepared.

An unauthorized signature may be ratified by conduct as well as express statements. See Comment 3 to Ark. Code Ann. § 4-3-103. If there is a fact issue as to whether a signature has been ratified, a separate instruction may be necessary on that issue.

AMI 3002

**MEASURE OF DAMAGES—FAILURE TO EXERCISE
ORDINARY CARE**

[If you decide for _____ on the question of li-
(plaintiff)
ability] [If an interrogatory requires you to assess the
damages of _____], you must then fix the amount of
(plaintiff)
money that will reasonably and fairly compensate
_____ for [any of] the following _____ element(s) of
(plaintiff) (number)
damage:

[First: The amount of the check(s) (reduced by
any amounts recovered by _____ from other sources)
(plaintiff)
(reduced by the amount of any checks {or parts
thereof} you find were intended to be directed to _____
(name)
_____);] [and]
(of party cashing or depositing checks)

[Second: If _____ has proved that _____ acted in
(plaintiff) (defendant)
bad faith, any other damages _____ suffered as a
(plaintiff)
proximate consequence.]

NOTE ON USE

Use this instruction with AMI 3001.

Use the second bracketed element when there is evidence from
which the jury could find that the bank acted in bad faith.

COMMENT

This instruction is based on Ark. Code Ann. § 4-4-103(e), American
State Bank v. Union Planters Bank, N.A., 332 F.3d 533 (8th Cir. 2003),
and Starkey Constr., Inc. v. Elcon, Inc., 248 Ark. 958, 457 S.W.2d 509
(1970).

Ark. Code Ann. § 4-4-103(e) provides that the “measure of damages

for failure to exercise ordinary care in handling an item is the amount of the item *reduced by an amount that could not have been realized by the exercise of ordinary care.*" (emphasis added) The Committee had no guidance in Arkansas law as to whether the italicized phrase applies in the situation in which the loss allocation provisions of either Ark. Code Ann. §§ 4-3-406 or 4-4-406 are applicable and, therefore, did not include that phrase in the first element of this instruction. Trial courts should determine whether that part of § 4-4-103(e) should be included in the context of the loss allocation provisions of Ark. Code Ann. §§ 4-3-406 or 4-4-406. However, the Committee believes that the italicized phrase should be included if the provisions of Ark. Code Ann. §§ 4-3-406 or 4-4-406 are not applicable. *Compare* Citizens Bank, Bentonville v. Chitty, 285 Ark. 55, 684 S.W.2d 814 (1985). In that situation, the first part of the first element of the instruction should read as follows: "First, The amount of the check(s) reduced by an amount that could not have been realized by the exercise of ordinary care."

The second element of this instruction is taken directly from Ark. Code Ann. § 4-4-103(e). The Committee had no guidance in Arkansas law as to how "bad faith" should be defined and whether there are essential elements required to find "bad faith." In addition, the Committee had no guidance as to the types of damages that are recoverable if "bad faith" is found by the jury. Accordingly, trial courts should determine those issues in the context of the cases in which they are presented until there is guidance from Arkansas appellate courts.

AMI 3003

**DEFENSE—FAILURE TO PROMPTLY NOTIFY—
LOSS ALLOCATION****A. Defendant's Burden of Proof**

 claims and has the burden of proving that
(Defendant)
there was fault on the part of which substan-
(plaintiff)
tially contributed to 's loss and has the burden
(plaintiff)
of proving each of four essential propositions:

First, that sent or made available to
(defendant) (plaintiff)
a statement of account showing payment of the items
in question by item number, amount and date of pay-
ment;

Second, that did not exercise reasonable
(plaintiff)
promptness in examining the statement to determine
whether any payment was not authorized and did not
promptly notify of 's contention that
(defendant) (plaintiff)
payment[s] [was] [were] unauthorized;

Third, that should reasonably have discov-
(plaintiff)
ered the unauthorized payment[s]; and

Fourth, [that suffered a loss by reason of
(defendant)
 's failure to promptly notify that the pay-
(plaintiff) (defendant)
ment was not authorized] [or] [with respect to any
other item, that paid the item in good faith
(defendant)
before it received notice from of the (unautho-
(plaintiff)
rized signature) (alteration) and after had been
(plaintiff)

afforded a reasonable period of time, not exceeding thirty days, in which to examine the item or statement of account and notify _____].

(defendant)

B. Plaintiff's Burden of Proof

If you find that _____ has proved each of the propositions in Part A, then _____ has the burden of proving each of the following two essential propositions:

(defendant)

(plaintiff)

First, that _____ failed to exercise ordinary care in paying the item;

(defendant)

And second, that the failure of _____ to exercise ordinary care substantially contributed to _____'s loss.

(defendant)

(plaintiff)

C. Allocation of Loss

[If you find that _____ has proved each of the propositions in Part A and you have also found that _____ has proved each of the propositions in Part B, then you are to allocate the loss of _____ between _____ and _____ according to the extent to which the failure of _____ to promptly notify _____ of the unauthorized payment and the failure of _____ to exercise ordinary care each contributed to the loss.]

(defendant)

(plaintiff)

(plaintiff)

(plaintiff)

(defendant)

(plaintiff)

(defendant)

(defendant)

NOTE ON USE

Use this instruction when there is evidence that the plaintiff failed

to notify the defendant promptly of an unauthorized payment of an item after being afforded the opportunity to review the item or a statement of account.

Use this instruction with AMI 3001 and AMI 3002. Because this instruction requires an allocation of loss similar to the issue of comparative fault, when this instruction is used, the issues in this instruction and AMI 3001 should be submitted to the jury on interrogatories.

If this instruction is used, also use AMI 3004 (Definition of "Ordinary Care") and AMI 3005 (Definition of "Good Faith").

COMMENT

This instruction is based on Ark. Code Ann. § 4-4-406, *Mercantile Bank of Ark. v. Vowell*, 82 Ark. App. 421, 117 S.W.3d 603 (2003), and *Coast to Coast Stores, Inc. v. Citizens Bank*, 676 F. Supp. 923 (E.D. Ark. 1987). If the bank's customer proves that the bank did not pay the item in good faith, Ark. Code Ann. § 4-4-406(d) does not apply.

Without regard to care or lack of care of either the customer or the bank, a customer who does not within one year after the statement or items are made available to the customer discover and report the customer's unauthorized signature or any alteration of an item is precluded from asserting against the bank the unauthorized signature or alteration. Ark. Code Ann. § 4-4-406(f). The requirement is to notify the bank within the stated time, not to file suit. *See Coast to Coast Stores, Inc., supra*.

In *Douglas Cos., Inc. v. Commercial Nat. Bank of Texarkana*, 419 F.3d 812 (8th Cir. 2005), the court held that § 4-4-406 was not applicable to an encoding error and approved the use of standard negligence instructions to address the issue of ordinary care.

AMI 3004

UCC DEFINITION—ORDINARY CARE

“Ordinary care” means observance of reasonable commercial standards prevailing in the area in which a person is located, with respect to the business in which the person is engaged. [In the case of a bank that takes an instrument for processing for collection of payment by automated means, reasonable commercial standards do not require the bank to examine the instrument if the failure to examine does not violate the bank’s prescribed procedures and the bank’s procedures do not vary unreasonably from general banking usage.]

NOTE ON USE

Use this instruction when AMI 3003 or AMI 3006 is used.

COMMENT

This instruction is based on Ark. Code Ann. §§ 4-3-103(a)(8) and 4-4-103.

AMI 3005

UCC DEFINITION—GOOD FAITH

“Good faith” means honesty in fact and the observance of reasonable commercial standards of fair dealing.

NOTE ON USE

Use this instruction when AMI 3003 or AMI 3006 is used.

COMMENT

This instruction is based on Ark. Code Ann. § 4-3-103(a)(5).

AMI 3006

**NEGLIGENCE CONTRIBUTING TO FORGED
SIGNATURE OR ALTERATION OF INSTRUMENT****A. Defendant's Burden of Proof**

_____ claims and has the burden of proving that
(Defendant)
there was fault on the part of _____ which precludes
(plaintiff)
_____ from asserting [the alteration of (an) instru-
(plaintiff)
ment(s)] [the making of a forged signature on (an)
instrument(s)] and has the burden of proving each of
three essential propositions:

First, that _____ failed to exercise ordinary care;
(plaintiff)

Second, that _____'s failure to exercise ordinary
(plaintiff)
care substantially contributed to [the alteration of (an)
instrument(s)] [the making of a forged signature on
(an) instrument(s)]; and

Third, that _____ [paid the instrument(s)] [took
(defendant)
the instrument(s) for value or for collection] in good
faith.

B. Plaintiff's Burden of Proof

If you find that _____ has proved each of the
(defendant)
propositions in Part A, then _____ has the burden of
(plaintiff)
proving each of the following two essential
propositions:

First, that _____ failed to exercise ordinary care
(defendant)
in paying the item;

**And second, that the failure of _____ to exercise
(defendant)
ordinary care substantially contributed to _____'s
(plaintiff)
loss.**

C. Allocation of Loss

**If you find that _____ has proved each of the
(defendant)
propositions in Part A and you have also found that
_____ has proved the propositions in Part B, then you
(plaintiff)
are to allocate the loss of _____ between _____ and
(plaintiff) (plaintiff)
_____ according to the extent to which the failure of
(defendant)
each to exercise ordinary care contributed to the loss.**

NOTE ON USE

Use this instruction when there is proof that the plaintiff failed to exercise ordinary care that substantially contributed to an alteration of an instrument or to the making of a forged signature on an instrument.

Use AMI 3004 and AMI 3005 with this instruction.

COMMENT

This instruction is based on Ark. Code Ann. § 4-3-406. *See also* *Mercantile Bank of Ark. v. Vowell*, 82 Ark. App. 421, 117 S.W.3d 603 (2003) (no preclusion where bank's customer attempted to safeguard its checkbooks, ATM cards and PIN) and *Union Nat. Bank of Little Rock v. Daneshvar*, 33 Ark. App. 171, 803 S.W.2d 567 (1991) (sufficient evidence to justify submitting question of whether conduct after forgery contributed to plaintiff's loss).

CHAPTER 31

EMPLOYMENT

AMI

- 3101. Issues—Arkansas whistle-blower act.
- 3102. Definition—"adverse action."
- 3103. Definition—"good faith."
- 3104. Definition—"waste."
- 3105. Defense.
- 3106. Damages.
- 3107. Issues—Wrongful termination—Handbook exception to at-will doctrine

AMI 3101

ISSUES—ARKANSAS WHISTLE-BLOWER ACT

 claims damages from and has the
(Plaintiff) (defendant)
burden of proving each of the following five propositions:

First, that *[he][she]* sustained damages;

Second, that *[he][she]* was a public employee;

Third, that took an adverse action against
(defendant)
 ;
(plaintiff)

Fourth, that took the adverse action
(defendant)
because:

- a. (a person authorized to act on)
(plaintiff) (plaintiff's)

behalf) communicated in good faith to an appropriate authority by a verbal or written report:

I. [the existence of waste of public funds, property, or manpower administered or controlled by a public employer] [or] [a violation or suspected violation of a law, rule, or regulation adopted under the law of _____]; and

(state) (political subdivision)

II. that the communication was made at a time and in a manner which gave the public employer reasonable notice of need to correct the waste or violation.] [or]

[b. (plaintiff) participated or gave information in an investigation, hearing, court proceeding, legislative or other inquiry, or in any form of administrative review.]
[or]

**[c. _____ objected to or refused to carry out a
(plaintiff)
directive that [he][she] reasonably believed violates a
law or a rule or regulation adopted under the author-
ity of [_____] [_____] and]
(state) (political subdivision)**

Fifth, that the adverse action was the proximate cause of _____ damages.

NOTE ON USE

In the fourth element, use the appropriate alternative(s) as presented by the evidence.

Use the appropriate definition from this chapter if there is a fact issue with respect to “adverse action” (AMI 3102), “good faith” (AMI 3103), or “waste” (AMI 3104).

If appropriate for submission to the jury in a particular case, an ad-

ditional instruction may be prepared based upon the statutory definitions for “public employee” (Ark. Code Ann. § 21-1-602(4)), “appropriate authority” (Ark. Code Ann. § 21-1-602(2)), “communicate” (Ark. Code Ann. § 21-1-602(3)), or “violation” (Ark. Code Ann. § 21-1-602(6)).

It is anticipated that the court will determine as a matter of law the existence of a “public employer,” since that statutory term includes a list of specific entities in Ark. Code Ann. § 21-1-602(5).

COMMENT

This instruction is based on Ark. Code Ann. §§ 21-1-602, 603, and 604(c), and *Crawford County v. Jones*, 365 Ark. 585, 232 S.W.3d 433 (2006).

“Public employee” is defined at Ark. Code Ann. § 21-1-602(4) as “a person who performs a full or part-time service for wages, salary, or other remuneration for a public employer.” See *State, Dep’t of Career Educ., Div. of Rehab. Servs. v. Means*, 2013 Ark. 173, at 4–7 (2013) (holding as a matter of law that part-time contractor for department of the State was a public employee).

A direct supervisor is an “appropriate authority” under Ark. Code Ann. § 21-1-602(2)(A). *Id.* at 8–9 (distinguishing *Crawford Cnty. v. Jones*, 365 Ark. 585, 232 S.W.3d 433 (2006)).

AMI 3102

DEFINITION—“ADVERSE ACTION”

“Adverse action” means to discharge, threaten, or otherwise discriminate or retaliate against a public employee in any manner that affects the employee’s employment, including compensation, job location, rights, immunities, promotions, or privileges.

NOTE ON USE

Use this instruction with AMI 3101.

COMMENT

This definition is taken from Ark. Code Ann. § 21-1-602(1) and Crawford County v. Jones, 365 Ark. 585, 232 S.W.3d 433 (2006).

AMI 3103

DEFINITION—"GOOD FAITH"

"Good faith" means a reasonable basis in fact for the communication of the existence of [waste] [or] [a violation].

Good faith is lacking when the public employee does not have personal knowledge of a factual basis for the communication or when the public employee knew or reasonably should have known that the communication of the [waste] [or] [violation] was malicious, false, or frivolous.

NOTE ON USE

Use this instruction with AMI 3101.

COMMENT

This instruction is based on Ark. Code Ann. § 21-1-603(b).

AMI 3104

DEFINITION—"WASTE"

"Waste" means a public employer's conduct or omissions that result in substantial abuse, misuse, destruction, or loss of public funds, property or manpower belonging to or derived from state or local political subdivision's resources.

NOTE ON USE

Use this instruction with AMI 3101.

COMMENT

This instruction is based on Ark. Code Ann. § 21-1-602(7).

AMI 3105

DEFENSE

As a defense to the claim of _____, _____
 (plaintiff) (defendant)
 contends that the action taken was due to:

a. [_____'s misconduct] [or]
 (plaintiff)

b. [_____'s poor job performance] [or]
 (plaintiff)

c. [a reduction in workforce unrelated to _____'s
 (plaintiff)
 engaging in a protected communication or act].

_____ has the burden of proving this contention.
 (Defendant)

NOTE ON USE

Use this instruction with AMI 3101 if the employer asserts any of the three affirmative defenses provided in Ark. Code Ann. § 21-1-604(e).

COMMENT

This instruction is based on Ark. Code Ann. § 21-1-604(e)).

AMI 3106

DAMAGES

If you decide for on the issue of liability,
(plaintiff)
you must then fix the amount of money that will reasonably and fairly compensate [him][her] for [any of] the following element(s) of damage sustained that you find [was]/[were] proximately caused by the adverse action:

[here insert the elements]:

[First:]

[Second:]

[Third:]

[etc:]

Whether [this] [any of these (insert number)] element(s) of damage has been proved by the evidence is for you to determine.

NOTE ON USE

Use this instruction with AMI 3101.

Complete this instruction with the applicable elements of damage permitted under Ark. Code Ann. § 21-1-604(d).

Additional remedies are provided in Ark. Code Ann. § 21-1-605 and may be considered by the court.

COMMENT

This instruction is based on Ark. Code Ann. §§ 21-1-604(d), -605.

AMI 3107

ISSUES—WRONGFUL TERMINATION—HANDBOOK
EXCEPTION TO AT-WILL DOCTRINE

 claims damages from for wrongful
(Plaintiff) (defendant)
termination of [his] [her] employment. An employer
may [discharge] [or] [lay off] an employee with or
without cause without incurring liability unless the
employer expressly agrees otherwise. In order to re-
cover on the claim of wrongful termination, has
(plaintiff)
the burden of proving each of six essential
propositions:

First, that [he][she] sustained damages;

Second, that distributed a [manual]
(defendant)
[handbook] [or] to [his] [her] [its] em-
(insert terminology used)
ployees, including ;
(plaintiff)

Third, that the [manual, handbook, etc.] contained
[an] express provision[s] concerning [termination of
employment for cause] [or] [layoff from employment];

Fourth, that relied on [that][those] provi-
(plaintiff)
sion[s];

Fifth, that failed to follow [that] [those]
(defendant)
provision[s] when was [terminated] [laid off];
(plaintiff)
and

Sixth, that the [termination] [layoff] was the
proximate cause of 's damages.
(plaintiff)

[If you find from the evidence in this case that each of these propositions has been proved, then your verdict should be for _____ against _____;
(plaintiff) (defendant);

but if, on the other hand, you find from the evidence that any of these propositions has not been proved, then your verdict should be for _____].
(defendant)

NOTE ON USE

This instruction is designed for use when there is no definite term of employment or written employment agreement and reliance is placed on the provisions of an employment manual. It may be modified for use in a case involving an employment contract.

Do not use the final bracketed paragraph when the case is submitted on interrogatories.

COMMENT

In *Gladden v. Arkansas Children's Hosp.*, 292 Ark. 130, 728 S.W.2d 501 (1987), the Court rejected "as outmoded and untenable" the applicability of the employment at-will doctrine even where the employment agreement contains an express provision requiring cause for termination, and modified that rule to permit enforcement of such a provision in a personnel manual upon which an employee relies. That modified rule was applied in *Cisco v. King*, 90 Ark. App. 307, 205 S.W.3d 808 (2005).

The requisite agreement must be express and will not be implied from other provisions. *Mertyris v. P.A.M. Transport, Inc.*, 310 Ark. 132, 832 S.W.2d 823 (1992) (seven listed specific grounds for termination insufficient); *Hice v. City of Fort Smith*, 75 Ark. App. 410, 58 S.W.3d 870 (2001) (handbook stated it was not a contract and that employment was at-will); *St. Edward Mercy Medical Center v. Ellison*, 58 Ark. App. 100, 946 S.W.2d 726 (1997) (same).

In *Crain Industries, Inc. v. Cass*, 305 Ark. 566, 810 S.W.2d 910 (1991), the at-will exception was expanded to apply to an express provision for layoffs on the basis of seniority. In that case, a post-employment disclaimer of contractual employment was not enforced because it was not shown to have been noticed to employees. See also *Crawford County v. Jones*, 365 Ark. 585, 232 S.W.3d 433 (2006) (layoff procedure enforced). Compare *Faulkner v. Arkansas Children's Hosp.*, 347 Ark. 941, 69 S.W.3d 393 (2002) (internal grievance process regarding reas-

signment held not the same as a termination for cause provision in an employment manual and not enforced).

In *Magic Touch Corp. v. Hicks*, 99 Ark. App. 334, 260 S.W.3d 322 (2007), an employment agreement required “just cause as set out in the Employee Handbook” for termination, and the handbook provided for dismissal for “insubordination.” The court observed that, while the existence of justification for termination is usually a question of fact, the term “insubordination” is not ambiguous and need not be defined. In that case the evidence clearly established just cause on the ground of insubordination, and the trial court’s finding to the contrary was clearly erroneous.

An implied provision of an at-will employment contract is that an employee will not be discharged for an act done in the public interest. *Lynn v. Wal-Mart Stores, Inc.*, 102 Ark. App. 65, 280 S.W.3d 574 (2008). This public policy exception to the at-will doctrine is grounded in the statutes and constitution of the state. *Id.* An employer’s purported failure to follow its private, internal policies or the labor laws of foreign countries does not implicate the public policy of Arkansas. *Id.*

CHAPTER 35

CLOSING INSTRUCTIONS

Table of Instructions

AMI

- 3501. Closing Instructions.
- 3502. Closing Instructions—Additional Cautionary Instructions.
- 3503. Jury to Reach Agreement if Possible—Deadlocked Jury.

AMI 3501

CLOSING INSTRUCTIONS

1. General Instructions

You have now heard all the evidence and the instructions on the law you must apply in reaching your verdict. You soon will hear the lawyers' closing arguments and then go to the jury room to decide this case. I have a few final instructions for you on how to proceed.

- (a) Remember that *you are to decide this case fairly, based only on the evidence presented in this courtroom and the law as instructed by me. Do not consider information from any other source. And do not allow sympathy, prejudice, or like or dislike of any party or any attorney in this case to influence your decision.*

Keep in mind that the Basic Rule I have explained

to you throughout the trial continues to apply during your deliberations: *You are to discuss the case only among yourselves. Do not communicate about this case and the places and persons involved by any means whatsoever with anyone else at all, or look for or receive any information whatsoever about this case—including through Electronic Devices—other than the evidence in this courtroom and the law as I have instructed you, until your jury duty is complete and I have discharged you.*

- [(b) Any notes you may have taken during the trial may be taken to the jury room to use during your deliberations. Your notes are simply an aid to your own memory, and neither your notes nor those of any other juror are a substitute for your own memory or other jurors' memory. Leave your notes in the jury room when you have concluded your deliberations.]
- (c) Do not begin deliberations until all of you are assembled in the jury room. Once you are all there, the first thing for you to do is to elect one of you to act as foreperson during your deliberations. The foreperson should see to it that your discussions are orderly and that every one of you has a fair opportunity to be heard.
- (d) If any of you needs to communicate with me for any reason, write me a note and give it to *(the bailiff) (court personnel)*. In your note do not disclose any vote or division among yourselves.

[2. Case Submitted on General Verdict

At least nine of you must agree to arrive at a verdict.

If your verdict is unanimous, only the foreperson will sign your verdict form.

If your verdict is not unanimous, but nine or more of you agree on the verdict, then each of you who agrees must sign the verdict form. Those of you who do not agree must not sign the verdict form.]

[3. Case Submitted on Interrogatories

I will now give you a verdict form with *(a question) (questions)* you must answer. *(The answer to this question will be your verdict.) (Consider your answer to each of these questions as a separate verdict.)*

Nine or more of you must agree on the answer to *(the question) (any question)* for that answer to be your verdict. *(It is not necessary that the same nine or more of you agree on each verdict. Each question is separate.)*

If your answer to *(the question) (any question)* is unanimous, only the foreperson will sign the verdict form *(for that question)*. If your answer is not unanimous, but nine or more of you agree *(on that answer)*, each of you who agrees must sign the answer. Those who do not agree must not sign.]

NOTE ON USE

Part 1 of this instruction, "General Instructions," is to be given when the case is submitted to the jury. Paragraph (b) of Part 1, in parentheses, should be given if jurors are allowed to take notes during trial. AMI 3502 may also be given in the court's discretion if the trial has been a long one.

Part 2 of this instruction, "Case Submitted on General Verdict," in brackets, is to be given when the case is submitted on a general verdict.

Part 3 of this instruction, "Case Submitted on Interrogatories," in brackets, is to be given when the case is submitted on interrogatories.

COMMENT

Nine jurors are sufficient for a verdict in a civil trial, Ark. Const. Art. 2, § 7, Amend. 16.

When the case is submitted on more than one interrogatory, any nine jurors may return a verdict. It is not necessary that the interrogatories, each of which constitutes a separate verdict, be signed by the same nine jurors when the verdict is not unanimous. *McChristian v. Hooten*, 245 Ark. 1045, 1051–52, 436 S.W.2d 844, 848–49 (1969).

Research References

West's Key Number Digest
Trial ¶217, 232(3)

Legal Encyclopedias
C.J.S., Trial §§ 642 to 643, 684, 777 to 780

AMI 3502

**CLOSING INSTRUCTIONS—ADDITIONAL
CAUTIONARY INSTRUCTIONS**

Remember what the Basic Rule I have given you means:

Do not talk in person or by telephone or communicate with anyone except each other in any way, including through Electronic Devices such as cell phones, iPhones, Smartphones, Blackberries, PDAs, iPads, computers, and other electronic devices. Do not use them to talk, send or receive text messages, send or receive email, participate in or read a chat room or discussion list, post updates to a website or to social media such as Facebook or MySpace, to blog, to “Tweet” on Twitter, or to communicate through any other Internet-based or other electronic means at all.

Do not share information about the case or the people or places involved with anyone else through any means. And do not allow anyone else to share with you any such information. Do not ask anyone for advice or information about this case. Do not let anyone outside the courtroom communicate to you about the case or the people or places involved. If someone tries to communicate anything to you by any means about the case or the people or places involved, notify court personnel.

Do not read any news stories or articles about the case or the people or places involved, whether in print or any electronic form. Do not listen to any radio or television or online reports or Podcasts about the case.

Do not search the Internet, such as through

Google or on Wikipedia, to find out anything about this case or the people or places involved. Do not do research in a library. Do not read newspapers or online news sources, watch television or online services, or listen to the radio or online sources, or use any electronic device to gather information, to get definitions, or to conduct any other research at all about this case.

Do not visit the places involved in the case or use the Internet, such as Google Earth, to look at the places involved or at maps, descriptions, or pictures.

NOTE ON USE

This reminder of the cautionary instructions may be given in the court's discretion after a lengthy trial.

Research References

West's Key Number Digest
Trial ¶217, 232(3)

Legal Encyclopedias
C.J.S., Trial §§ 642 to 643, 684, 777 to 780

AMI 3503**JURY TO REACH AGREEMENT IF POSSIBLE—
DEADLOCKED JURY**

It is important that the jury reach a verdict in the trial of this case. A mistrial or a hung jury means a continuation of litigation and a delay in the administration of justice, impairing, at times, the rights and remedies of litigants.

Under your oath as jurors, you have obligated yourselves to render verdicts in accordance with the law and the evidence. In your deliberations you should weigh and discuss the evidence and make every reasonable effort to harmonize your individual views on the merits of the case and to decide where the preponderance of the evidence lies. Each of you should give due consideration to the views and opinions of other jurors who disagree with your views and opinions. No juror should surrender his or her sincere beliefs in order to reach a verdict; to the contrary, the verdict should be the result of each juror's free and voluntary opinion. By what I have said as to the importance of the jury reaching a verdict, I do not intend to suggest or require that you surrender your conscientious convictions, only that each of you make every sincere effort to reach a proper verdict. Therefore, I request the jury to retire for further deliberation for a reasonable time in an attempt to reach a verdict.

NOTE ON USE

This instruction should not be given until the jury after prolonged deliberation has not reached a verdict. The trial judge may wish to give this type of instruction in his own words. The above is submitted as a guide to avoid errors sometimes made.

COMMENT

The practical administration of the law requires that trial judges shall have the power to admonish the jury as to the desirability of reaching a verdict. *Kansas City Southern Ry. Co. v. Winter*, 217 Ark. 148, 228 S.W.2d 1001 (1950).

It is proper to tell the jury to make a conscientious effort to reach a verdict. *St. Louis, I.M. & S. Ry. Co. v. Carter*, 111 Ark. 272, 164 S.W. 715 (1914). However, it is error for the court to indicate an opinion as to the merits of the case, *St. Louis, I.M. & S.R. Co. v. Devaney*, 98 Ark. 83, 135 S.W. 802 (1911); and it is error to indicate that the minority should yield to the majority views. *J.F. McGehee & Co. v. Fuller*, 169 Ark. 920, 277 S.W. 39 (1925).

Research References

West's Key Number Digest

Trial \Leftrightarrow 314(1)

Legal Encyclopedias

C.J.S., Trial § 978

CHAPTER 36

ILLUSTRATIVE SETS OF INSTRUCTIONS

Table of Instructions

AMI

- I. Right-Angle Automobile Collision.
- II. Multiparty Automobile Collision.
- III. Malpractice Case.
- IV. Basic Contract Dispute.
- V. First Party Insurance Claim (MedPay Denial).

I. RIGHT-ANGLE AUTOMOBILE COLLISION

STATEMENT OF FACTS

The plaintiff, Henry Miller, was driving his automobile north on Oak Street approaching the intersection with Pine Street. John Anderson, the defendant, was driving his automobile east on Pine Street, also approaching the intersection with Oak Street. There were no traffic controls at this intersection. The two vehicles collided near the center of the intersection, and each driver insisted that he had entered the intersection first. Substantial damage was done to both vehicles, and Anderson received minor personal injuries which resulted in no permanent disability and no loss of time from his employment but did require medical attention. Miller, however, suffered brain damage, which resulted in permanent paralysis of his left leg and required extensive and expensive medical care and hospitalization. Miller brought suit against Anderson for his property damage and personal injuries, including loss of income, loss of earning ability, and present and future medical bills. Anderson filed a counterclaim asking for the damage to his automobile, for recovery for pain and suffering, and for his medical bills. Both the complaint and counterclaim contained allegations of failure to yield the right of way, failure to keep a lookout, failure to keep the vehicle under control, and driving at an excessive speed.

The proof showed that Miller had lost considerable income, that his earning ability was seriously impaired, and that he would continue to suffer pain and require medical treatment in the future.

A suggested set of instructions in recommended sequence:

- | | (AMI
number) | |
|-----|-----------------|---|
| 1. | 103. | Respective Duties of Judge and Jury—Cautionary Instructions. |
| 2. | 104. | Jury—Personal Observations and Experiences. |
| 3. | 105. | Credibility of Witnesses. |
| 4. | 108. | Circumstantial Evidence. |
| 5. | 202. | Meaning of Burden of Proof and Preponderance of the Evidence. |
| 6. | 204. | Issues—Complaint and Counterclaim Based on Negligence or Fault—Burden of Proof. |
| 7. | 302. | Negligence—Definition. |
| 8. | 303. | Ordinary Care—Definition. |
| 9. | 305. | Duty to Use Ordinary Care. |
| 10. | 501. | Proximate Cause—Concurring Proximate Cause—Definition. |
| 11. | 901. | Common Law Rules of Road—Lookout—Control—Speed. |
| 12. | 904. | Right of Way—Uncontrolled Intersection. |
| 13. | 909. | Right of Way—Definition—Acquisition—Use. |
| 14. | 2103. | Comparative Negligence or Fault—Complaint and Counterclaim—One Plaintiff and One Defendant. |
| 15. | 2201. | Measure of Damages—General Instruction. |
| 16. | 2201. | Measure of Damages—General Instruction. |
| 17. | 2221. | Fair Market Value—Definition. |
| 18. | 2219. | Purpose of Mortality Tables. |
| 19. | 2220. | Present Value—Definition. |
| 20. | 3501. | Closing Instructions. |

Text of Suggested Instructions

1. (AMI 103)

- (a) The faithful performance of your duties as jurors is essential to the administration of justice.
- (b) It is my duty as judge to inform you of the law applicable to this case by instructions, and it is your duty to accept and follow them as a whole, not singling out one instruction to the exclusion of others. You should not consider any rule of

law with which you may be familiar unless it is included in my instructions.

- (c) It is your duty to determine the facts from the evidence produced in this trial. You are to apply the law as contained in these instructions to the facts and render your verdict upon the evidence and law. You should not permit sympathy, prejudice, or like or dislike of any party to this action or of any attorney to influence your findings in this case.
- (d) In deciding the issues, you should consider the testimony of the witnesses and the exhibits received in evidence. The introduction of evidence in court is governed by law. You should accept without question my rulings as to the admissibility or rejection of evidence, drawing no inferences that by these rulings I have in any manner indicated my views on the merits of the case.
- (e) Opening statements, remarks during the trial, and closing arguments of the attorneys are not evidence but are made only to help you in understanding the evidence and applicable law. Any argument, statements, or remarks of attorneys having no basis in the evidence should be disregarded by you. However, an admission of fact by an attorney is binding on his or her client.
- (f) I have not intended by anything I have said or done, or by any questions that I may have asked, to intimate or suggest what you should find to be the facts, or that I believe or disbelieve any witness who testified. If anything that I have done or said has seemed to so indicate, you will disregard it.

2. (AMI 104)

In considering the evidence in this case you are not required to set aside your common knowledge, but you have a right to consider all the evidence in the light of your own observations and experiences in the affairs of life.

3. (AMI 105)

You are the sole judges of the weight of the evidence and the credibility of the witnesses. In determining the credibility of any witness and the weight to be given his testimony, you may take into consideration his demeanor while on the witness stand, any prejudice for or against a party, his means of acquiring knowledge concerning any matter to which he testified, any interest he may have in the outcome of the

case, and the consistency or inconsistency of his testimony, as well as its reasonableness or unreasonableness.

4. (AMI 108)

A fact in dispute may be proved by circumstantial evidence as well as by direct evidence. A fact is established by direct evidence when, for example, it is proved by witnesses who testify to what they saw, heard, or experienced. A fact is established by circumstantial evidence when its existence can reasonably be inferred from other facts proved in the case.

5. (AMI 202)

A party who has the burden of proof on a proposition must establish it by a preponderance of the evidence, unless the proposition is so established by other proof in the case. "Preponderance of the evidence" means the greater weight of evidence. The greater weight of evidence is not necessarily established by the greater number of witnesses testifying to any fact or state of facts. It is the evidence which, when weighed with that opposed to it, has more convincing force and is more probably true and accurate. If, upon any issue in the case, the evidence appears to be equally balanced, or if you cannot say upon which side it weighs heavier, you must resolve that question against the party who has the burden of proving it.

6. (AMI 204)

Mr. Miller and Mr. Anderson claim damages from each other. A party claiming damages has the burden of proving each of three essential propositions:

First, that he has sustained damages;

Second, that the party from whom he seeks to recover was negligent;

And third, that such negligence was a proximate cause of the damages sustained by the claiming party.

Each party contends that the other acted with negligence which was a proximate cause of his own damages. Each has the burden of proving this contention.

7. (AMI 302)

When I use the word "negligence" in these instructions I mean the failure to do something which a reasonably careful person would do, or the doing of something which a reasonably careful person would not do,

under circumstances similar to those shown by the evidence in this case. It is for you to decide how a reasonably careful person would act under those circumstances.

8. (AMI 303)

A failure to exercise ordinary care is negligence. When I use the words "ordinary care," I mean the care a reasonably careful person would use under circumstances similar to those shown by the evidence in this case. It is for you to decide how a reasonably careful person would act under those circumstances.

9. (AMI 305)

It was the duty of both persons involved in the occurrence to use ordinary care for their own safety and the safety of others and their property.

10. (AMI 501)

The law frequently uses the expression "proximate cause," with which you may not be familiar. When I use the expression "proximate cause," I mean a cause which, in a natural and continuous sequence, produces damage and without which the damage would not have occurred.

This does not mean that the law recognizes only one proximate cause of damage. To the contrary, if two or more causes work together to produce damage, then you may find that each of them was a proximate cause.

11. (AMI 901)

In determining whether the driver of a motor vehicle was negligent you may consider the following three rules of the road:

First: It is the duty of the driver of a motor vehicle to keep a lookout for other vehicles or persons on the street or highway. The lookout required is that which a reasonably careful driver would keep under circumstances similar to those shown by the evidence in this case.

Second: It is the duty of the driver of a motor vehicle to keep his vehicle under control. The control required is that which a reasonably careful driver would maintain under circumstances similar to those shown by the evidence in this case.

Third: It is the duty of the driver of a motor vehicle to drive at a speed no greater than is reasonable and prudent under the circumstances, having due regard for any actual or potential hazards.

A failure to meet the standard of conduct required by any of these three rules is negligence.

12. (AMI 904)

When vehicles are approaching an intersection from different streets, the driver of a motor vehicle must yield the right of way to another driver who, in the exercise of ordinary care, has already entered the intersection.

If vehicles are approaching an intersection from different streets at such relative speeds and distances from the intersection that both vehicles will enter the intersection at about the same time, then the law requires the driver of the vehicle on the left to yield the right of way to the vehicle on the right.

A violation of these rules governing the approach to an intersection, although not necessarily negligence, is evidence of negligence to be considered by you along with all of the other facts and circumstances in the case.

13. (AMI 909)

When I use the term "right of way," I mean the superior right to the immediate use of the street.

One must exercise ordinary care in acquiring the right of way, and the right of way cannot be acquired by negligent conduct.

Once having obtained the right of way, a person must continue to exercise ordinary care to avoid injury or damage to himself or others.

14. (AMI 2103)

If you should find that Mr. Miller was not negligent or that his negligence was not a proximate cause of the occurrence, then he is entitled to recover the full amount of any damages you may find he has sustained which were proximately caused by any negligence of Mr. Anderson.

If you should find that Mr. Anderson was not negligent or that his negligence was not a proximate cause of the occurrence, then he is entitled to recover the full amount of any damages you may find he has sustained which were proximately caused by any negligence of Mr. Miller.

If you should find that the occurrence was proximately caused by the negligence of both Mr. Miller and Mr. Anderson, then you must compare the percentages of their negligence.

If the negligence of Mr. Miller was of less degree than the negligence of Mr. Anderson, then you should find for Mr. Miller on his complaint, and also for him on the counterclaim of Mr. Anderson. However, you must reduce the damages of Mr. Miller in proportion to the degree of his own negligence.

If the negligence of Mr. Anderson was of less degree than the negligence of Mr. Miller, then you should find for Mr. Anderson on his counterclaim and also for him on the complaint of Mr. Miller. However, you must reduce the damages of Mr. Anderson in proportion to the degree of his own negligence.

If you should find that Mr. Miller and Mr. Anderson were equally negligent, or that neither was negligent, then neither can recover from the other, and you should find against Mr. Miller on his complaint and against Mr. Anderson on his counterclaim.

15. (AMI 2201)

If you decide for Mr. Miller on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate him for any of the following six elements of damage which you find were proximately caused by the negligence of Mr. Anderson:

(a) (AMI 2202) First: The nature, extent, duration, and permanency of any injury.

(b) (AMI 2204) Second: The reasonable expense of any necessary medical care, treatment, and services received and the present value of such expense reasonably certain to be required in the future.

(c) (AMI 2205) Third: Any pain and suffering and mental anguish experienced in the past and reasonably certain to be experienced in the future.

(d) (AMI 2206) Fourth: The value of any earnings lost.

(e) (AMI 2207) Fifth: The present value of any loss of ability to earn in the future.

(f) (AMI 2210) Sixth: The difference in the fair market value of his automobile immediately before and immediately after the occurrence. In determining this difference you may take into consideration the reasonable cost of repairs.

(End of AMI 2201) Whether any of these six elements of damage has been proved by the evidence is for you to determine.

16. (AMI 2201)

If you decide for Mr. Anderson on the question of liability you must

then fix the amount of money which will reasonably and fairly compensate him for any of the following four elements of damage sustained which you find were proximately caused by the negligence of Mr. Miller:

(a) (AMI 2202) First: The nature, extent, and duration of any injury.

(b) (AMI 2204) Second: The reasonable expense of any necessary medical care, treatment, and services received.

(c) (AMI 2205) Third: Any pain and suffering and mental anguish experienced in the past.

(d) (AMI 2210) Fourth: The difference in the fair market value of his automobile immediately before and immediately after the occurrence. In determining this difference you may take into consideration the reasonable cost of repairs.

(End of AMI 2201) Whether any of these four elements of damage has been proved by the evidence is for you to determine.

17. (AMI 2221)

When I use the expression "fair market value," I mean the price that the automobile would bring on the open market in a sale between a seller who is willing to sell and a buyer who is willing and able to buy after a reasonable opportunity for negotiations.

18. (AMI 2219)

In the event that you find that Mr. Miller is entitled to damages arising in the future because of injuries, future medical expenses, or loss of earning capacity, you must determine the amount of these damages.

If these damages are of a continuing nature, you may consider how long they will continue. If they are permanent in nature, then in computing these damages you may consider how long Mr. Miller is likely to live.

With respect to loss of future earning capacity, you may consider that some persons work all their lives and others do not and that a person's earnings may remain the same or may increase or decrease in the future.

Mortality tables are evidence of an average life expectancy of a person who has reached a certain age, but they are not conclusive. They may be considered by you in connection with other evidence relating to the probable life expectancy of Mr. Miller, including evidence of his occupation, health, habits, and other activities, bearing in mind that some

persons live longer than the average and some persons less than the average.

19. (AMI 2220)

I have used the expression "present value" in these instructions with respect to certain elements of damage which you may find that Mr. Miller will sustain in the future. This simply means that if you find that Mr. Miller is entitled to recover any elements of damage which require you to determine their present value, you must take into consideration the fact that money recovered will earn interest, if invested, until the time in the future when these losses will actually occur. Therefore, you must reduce any award of such damages to compensate for the reasonable earning power of money.

20. (AMI 3501)

You have now heard all the evidence and the instructions on the law you must apply in reaching your verdict. You soon will hear the lawyers' closing arguments and then go to the jury room to decide this case. I have a few final instructions for you on how to proceed.

(a) Remember that *you are to decide this case fairly, based only on the evidence presented in this courtroom and the law as instructed by me*. Do not consider information from any other source. And do not allow sympathy, prejudice, or like or dislike of any party or any attorney in this case to influence your decision.

Keep in mind that the Basic Rule I have explained to you throughout the trial continues to apply during your deliberations: *You are to discuss the case only among yourselves. Do not communicate about this case and the places and persons involved by any means whatsoever with anyone else at all, or look for or receive any information whatsoever about this case—including through Electronic Devices—other than the evidence in this courtroom and the law as I have instructed you, until your jury duty is complete and I have discharged you.*

(b) Any notes you may have taken during the trial may be taken to the jury room to use during your deliberations. Your notes are simply an aid to your own memory, and neither your notes nor those of any other juror are a substitute for your own memory or other jurors' memory. Leave your notes in the jury room when you have concluded your deliberations.

(c) Do not begin deliberations until all of you are assembled in the jury room. Once you are all there, the first thing for you to do is to elect one of you to act as foreperson during your deliberations. The foreperson should see to it that your discussions are orderly and that every one of you has a fair opportunity to be heard.

(d) If any of you needs to communicate with me for any reason, write me a note and give it to (the bailiff) (court personnel). In your note do not disclose any vote or division among yourselves.

At least nine of you must agree to arrive at a verdict.

If your verdict is unanimous, only the foreperson will sign your verdict form.

If your verdict is not unanimous, but nine or more of you agree on the verdict, then each of you who agrees must sign the verdict form. Those of you who do not agree must not sign the verdict form.

VERDICT FORM

We, the Jury find in favor of Henry Miller, the plaintiff, on his claim against John Anderson, the defendant, and award him damages in the following amount: \$ _____

<u>Foreperson</u>	<u>Date</u>
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

VERDICT FORM

We, the Jury find in favor of John Anderson, the defendant, on his claim against Henry Miller, the plaintiff, and award him damages in the following amount: \$ _____.

<u>Foreperson</u>	<u>Date</u>
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

VERDICT FORM

We, the Jury, find that Henry Miller, the plaintiff, and John Anderson, the defendant, were equally negligent or that neither was negligent.

Foreperson

Date

II. MULTIPARTY AUTOMOBILE COLLISION

STATEMENT OF FACTS

William Fairchild boarded a Reliable Taxi Company cab and instructed James Cranston, the driver, to transport him to an address several miles outside the city limits. Cranston started his cab and drove toward the destination. Fairchild immediately began talking so loudly that Cranston had difficulty concentrating on his driving. At a point on the highway still some distance from the destination, Cranston started to pass an automobile driven by John Armstrong that was proceeding in the same direction. In so doing Cranston accelerated to 60 miles per hour and sounded his horn. As the taxi was passing Armstrong, he suddenly started a turn to the left to leave the highway on an intersecting street. The vehicles collided and the occupants of both vehicles sustained minor injuries. At the police station Armstrong failed a breathalyzer and admitted to having had two beers shortly before the collision.

Fairchild sued Cranston, Reliable Taxi Company, and Armstrong. Armstrong filed a cross-complaint against Cranston and Reliable. Cranston and Reliable filed a counterclaim against Armstrong.

A suggested set of instructions in recommended sequence:

(AMI

number)

1. 103. Respective Duties of Judge and Jury—Cautionary Instructions.
2. 104. Jury—Personal Observations and Experiences.
3. 105. Credibility of Witnesses.
4. 108. Circumstantial Evidence.
5. 201. Issues—Case Submitted on Interrogatories.
6. 202. Meaning of Burden of Proof and Preponderance of the Evidence.
7. 205. Issues—Multiple Claims—Varying Standards of Care—Burden of Proof.
8. 206. Issues—Affirmative Defenses—Burden of Proof.
9. 302. Negligence—Definition.
10. 303. Ordinary Care—Definition.
11. 305. Duty to Use Ordinary Care.
12. 501. Proximate Cause—Concurring Proximate Cause—Definition.
13. 602. Right to Assume Others Will Use Ordinary Care and Obey the Law.
14. 603. No Presumption of Negligence from Happening of Injury.

**(AMI
number)**

15. 606. Intoxication—Definition.
16. 607. Intoxication as Negligence.
17. 901. Common Law Rules of Road—Lookout—Control—Speed.
18. 902. Superior Right of Forward Vehicle.
19. 912. Passenger—Duty to Use Ordinary Care.
20. 1701. Duty of Common Carrier to Passenger.
21. 208. Issues—Imputed Conduct—Relationship Admitted.
22. 2201. Measure of Damages—General Instruction (and Appropriate Selections from AMI 2201 et seq.)
23. 2222. Measure of Damages—Damage to Property—General Instruction
24. 2221. Fair Market Value—Definition.
25. 3501. Closing Instructions.

Text of Suggested Instructions**1. (AMI 103)**

(a) The faithful performance of your duties as jurors is essential to the administration of justice.

(b) It is my duty as judge to inform you of the law applicable to this case by instructions, and it is your duty to accept and follow them as a whole, not singling out one instruction to the exclusion of others. You should not consider any rule of law with which you may be familiar unless it is included in my instructions.

(c) It is your duty to determine the facts from the evidence produced in this trial. You are to apply the law as contained in these instructions to the facts and render your verdict upon the evidence and law. You should not permit sympathy, prejudice, or like or dislike of any party to this action or of any attorney to influence your findings in this case.

(d) In deciding the issues, you should consider the testimony of the witnesses and the exhibits received in evidence. The introduction of evidence in court is governed by law. You should accept without question my rulings as to the admissibility or rejection of evidence, drawing no inferences that by these rulings I have in any manner indicated my views on the merits of the case.

(e) Opening statements, remarks during the trial, and closing arguments of the attorneys are not evidence but are made only to help you in understanding the evidence and applicable law. Any argument, state-

ments, or remarks of attorneys having no basis in the evidence should be disregarded by you. However, an admission of fact by an attorney is binding on his or her client.

(f) I have not intended by anything I have said or done, or by any questions that I may have asked, to intimate or suggest what you should find to be the facts, or that I believe or disbelieve any witness who testified. If anything that I have done or said has seemed to so indicate, you will disregard it.

2. (AMI 104)

In considering the evidence in this case you are not required to set aside your common knowledge, but you have a right to consider all the evidence in the light of your own observations and experiences in the affairs of life.

3. (AMI 105)

You are the sole judges of the weight of the evidence and the credibility of the witnesses. In determining the credibility of any witness and the weight to be given his testimony, you may take into consideration his demeanor while on the witness stand, any prejudice for or against a party, his means of acquiring knowledge concerning any matter to which he testified, any interest he may have in the outcome of the case, and the consistency or inconsistency of his testimony, as well as its reasonableness or unreasonableness.

4. (AMI 108)

A fact in dispute may be proved by circumstantial evidence as well as by direct evidence. A fact is established by direct evidence when, for example, it is proved by witnesses who testify to what they saw, heard, or experienced. A fact is established by circumstantial evidence when its existence can reasonably be inferred from other facts proved in the case.

5. (AMI 201)

After I have completed my instructions to you on the law in this case, you will be given a number of written questions called interrogatories. These interrogatories present the issues of fact that you must decide. In order that you may be fully acquainted with the issues of fact, which are being submitted in this case for your determination, I will now read these interrogatories, some or all of which you may be called upon to answer. You should keep these in mind as I explain the law applicable to this case.

1. Do you find from a preponderance of the evidence that there was a failure on the part of James Cranston to use the highest degree of

care which was a proximate cause of any damages sustained by William Fairchild?

ANSWER: _____

(Yes or No)

2. Do you find from a preponderance of the evidence that there was negligence on the part of James Cranston which was a proximate cause of any damages sustained by John Armstrong?

ANSWER: _____

(Yes or No)

3. Do you find from a preponderance of the evidence that there was negligence on the part of John Armstrong which was a proximate cause of any damages sustained by William Fairchild, James Cranston, or Reliable Taxi?

ANSWER: _____

(Yes or No)

4. Use this interrogatory only if you have answered "Yes" to one or more of Interrogatories 1 through 3:

Do you find from a preponderance of the evidence that there was negligence on the part of William Fairchild which was a proximate cause of any damages he may have sustained?

ANSWER: _____

(Yes or No)

If you have answered more than one of Interrogatories 1 through 4 "Yes," then answer this Interrogatory:

5. Using 100% to represent the total responsibility for the occurrence and any injuries or damages resulting from it, apportion the responsibility between the parties whom you have found to be responsible.

6. State the amount of any damages which you find from a preponderance of the evidence were sustained by William Fairchild as a result of the occurrence.

7. State the amount of any damages which you find from a preponderance of the evidence were sustained by James Cranston as a result of the occurrence.

8. State the amount of any damages which you find from a preponderance of the evidence were sustained by Reliable Taxi Company as a result of the occurrence.

9. State the amount of any damages which you find from a preponderance of the evidence were sustained by John Armstrong as a result of the occurrence.

6. (AMI 202)

A party who has the burden of proof on a proposition must establish it by a preponderance of the evidence, unless the proposition is so established by other proof in the case. "Preponderance of the evidence" means the greater weight of evidence. The greater weight of evidence is not necessarily established by the greater number of witnesses testifying to any fact or state of facts. It is the evidence which, when weighed with that opposed to it, has more convincing force and is more probably true and accurate. If, upon any issue in the case, the evidence appears to be equally balanced, or if you cannot say upon which side it weighs heavier, you must resolve that question against the party who has the burden of proving it.

7. (AMI 205)

William Fairchild claims damages from James Cranston and Reliable Taxi Company and has the burden of proving each of three essential propositions:

First, that he has sustained damages;

Second, that Mr. Cranston failed to use the highest degree of care;

And third, that such failure was a proximate cause of the damages of Mr. Fairchild.

William Fairchild also claims damages from John Armstrong and has the burden of proving each of three essential propositions:

First, that he has sustained damages;

Second, that Mr. Armstrong was negligent;

And third, that such negligence was a proximate cause of the damages of Mr. Fairchild.

John Armstrong also claims damages from James Cranston and Reliable Taxi Company and has the burden of proving each of three essential propositions:

First, that he has sustained damages;

Second, that Mr. Cranston was negligent;

And third, that such negligence was a proximate cause of the damages of Mr. Armstrong.

James Cranston and Reliable Taxi Company also claim damages from John Armstrong and have the burden of proving each of three essential propositions:

First, that they have sustained damages;

Second, that Mr. Armstrong was negligent;

And third, that such negligence was a proximate cause of the damages of Mr. Cranston and Reliable Taxi Company.

8. (AMI 206) (Modified)

Mr. Cranston, Reliable Taxi Company, and Mr. Armstrong contend that William Fairchild acted with negligence which was a proximate cause of his own damages.

Mr. Cranston and Reliable Taxi Company contend that John Armstrong acted with negligence which was a proximate cause of his own damages.

Mr. Armstrong contends that James Cranston acted with negligence which was a proximate cause of his own damages and those of Reliable Taxi Company.

A party who contends that another is chargeable with negligence which was a proximate cause of his or its own damages has the burden of proving this contention.

9. (AMI 302)

When I use the word "negligence" in these instructions I mean the failure to do something which a reasonably careful person would do, or the doing of something which a reasonably careful person would not do, under circumstances similar to those shown by the evidence in this case.

10. (AMI 303)

A failure to exercise ordinary care is negligence. When I use the

words "ordinary care," I mean the care a reasonably careful person would use under circumstances similar to those shown by the evidence in this case. It is for you to decide how a reasonably careful person would act under those circumstances.

11. (AMI 305)

It was the duty of all persons involved in the occurrence to use ordinary care for their own safety and the safety of others and their property.

12. (AMI 501)

The law frequently uses the expression "proximate cause," with which you may not be familiar. When I use the expression "proximate cause," I mean a cause which, in a natural and continuous sequence, produces damage and without which damage would not have occurred.

This does not mean that the law recognizes only one proximate cause of damage. To the contrary, if two or more causes work together to produce damage, then you may find that each of them was a proximate cause.

13. (AMI 602)

Every person using ordinary care has a right to assume, until the contrary is or reasonably should be apparent, that every other person will use ordinary care and obey the law. To act on that assumption is not negligence.

14. (AMI 603)

The fact that a collision occurred is not, of itself, evidence of negligence on the part of anyone.

15. (AMI 606)

A person is intoxicated when, as a result of drinking an alcoholic beverage, he has lost the normal control of his physical or mental faculties.

16. (AMI 607)

Whether a person involved in the occurrence was intoxicated at the time is a proper question for you to consider together with other facts and circumstances in evidence in determining whether he was negligent. Intoxication is no excuse for failure to act as a reasonably careful person would act. An intoxicated person is held to the same standard of care as a sober person.

17. (AMI 901)

In determining whether the driver of a motor vehicle was negligent, you may consider the following three rules of the road:

First: It is the duty of the driver of a motor vehicle to keep a lookout for other vehicles or persons on the street or highway. The lookout required is that which a reasonably careful driver would keep under circumstances similar to those shown by the evidence in this case.

Second: It is the duty of the driver of a motor vehicle to keep his vehicle under control. The control required is that which a reasonably careful driver would maintain under circumstances similar to those shown by the evidence in this case.

Third: It is the duty of the driver of a motor vehicle to drive at a speed no greater than is reasonable and prudent under the circumstances, having due regard for any actual or potential hazards.

A failure to meet the standard of conduct required by any of these three rules is negligence.

18. (AMI 902)

When two vehicles are traveling in the same direction, the vehicle in front has the superior right to the use of the highway for the purpose of leaving it to enter an intersecting road, and the driver behind must use ordinary care to operate his vehicle in recognition of this superior right. This does not relieve the driver of the forward vehicle of the duty to use ordinary care and to obey the rules of the road.

19. (AMI 912)

A passenger in an automobile is required to use ordinary care for his own safety.

20. (AMI 1701)

At the time of the occurrence in question, Reliable Taxi Company was a common carrier. A common carrier is not an insurer of its passengers' safety, but it has a duty to its passengers to use the highest degree of care consistent with the type of conveyance used and the practical operation of its business.

21. (AMI 208)

At the time of the occurrence Reliable Taxi and James Cranston were employer and employee. Therefore, any failure to use the highest degree of care or negligence on the part of Mr. Cranston is charged to

his employer Reliable Taxi with respect to the claims of William Fairchild and John Armstrong.

22. (AMI 2201)

If an interrogatory requires you to assess the damages of William Fairchild, you must then fix the amount of money which will reasonably and fairly compensate him for any of the following three elements of damage sustained:

(a) (AMI 2202) First: The nature, extent, and duration of any injury.

(b) (AMI 2204) Second: The reasonable expense of any necessary medical care, treatment, and services received.

(c) (AMI 2205) Third: Any pain and suffering experienced in the past.

(End of AMI 2201) Whether any of these three elements of damage has been proved by the evidence is for you to determine.

If an interrogatory requires you to assess the damages of James Cranston, you must then fix the amount of money which will reasonably and fairly compensate him for any of the following three elements of damage sustained:

(a) (AMI 2202) First: The nature, extent, and duration of any injury.

(b) (AMI 2204) Second: The reasonable expense of any necessary medical care, treatment, and services received.

(c) (AMI 2205) Third: Any pain and suffering experienced in the past.

(End of AMI 2201) Whether any of these three elements of damage has been proved by the evidence is for you to determine.

If an interrogatory requires you to assess the damages of John Armstrong, you must then fix the amount of money which will reasonably and fairly compensate him for any of the following three elements of damage sustained:

(a) (AMI 2202) First: The nature, extent, and duration of any injury.

(b) (AMI 2204) Second: The reasonable expense of any necessary medical care, treatment, and services received.

(c) (AMI 2205) Third: Any pain and suffering experienced in the past.

(d) (AMI 2210) Fourth: The difference in the fair market value of

his automobile immediately before and immediately after the occurrence plus a reasonable amount for loss of use. In determining any difference in market value, you may take into consideration the reasonable cost of repairs.

(End of AMI 2201) Whether any of these four elements of damage has been proved by the evidence is for you to determine.

23. (AMI 2222)

If an interrogatory requires you to assess the damage to the property of Reliable Taxi Company, you must then fix the amount of money which will reasonably and fairly compensate it for the element of damage it sustained:

(AMI 2227) The difference in the fair market value of its taxicab immediately before and immediately after the occurrence. In determining this difference, you may take into consideration the reasonable cost of repairs.

(End of AMI 2222) Whether this element of damage has been proved by the evidence is for you to determine.

24. (AMI 2221)

When I use the expression "fair market value," I mean the price that an automobile would bring on the open market in a sale between a seller who is willing to sell and a buyer who is willing and able to buy after a reasonable opportunity for negotiations.

25. (AMI 3501)

You have now heard all the evidence and the instructions on the law you must apply in reaching your verdict. You soon will hear the lawyers' closing arguments and then go to the jury room to decide this case. I have a few final instructions for you on how to proceed.

(a) Remember that *you are to decide this case fairly, based only on the evidence presented in this courtroom and the law as instructed by me*. Do not consider information from any other source. And do not allow sympathy, prejudice, or like or dislike of any party or any attorney in this case to influence your decision

Keep in mind that the Basic Rule I have explained to you throughout the trial continues to apply during your deliberations: *You are to discuss the case only among yourselves. Do not communicate about this case and the places and persons involved by any means whatsoever with anyone else at all, or look for or receive any information whatsoever about this case—including through Electronic Devices—other than the evidence in*

this courtroom and the law as I have instructed you, until your jury duty is complete and I have discharged you.

(b) Any notes you may have taken during the trial may be taken to the jury room to use during your deliberations. Your notes are simply an aid to your own memory, and neither your notes nor those of any other juror are a substitute for your own memory or other jurors' memory. Leave your notes in the jury room when you have concluded your deliberations.

(c) Do not begin deliberations until all of you are assembled in the jury room. Once you are all there, the first thing for you to do is to elect one of you to act as foreperson during your deliberations. The foreperson should see to it that your discussions are orderly and that every one of you has a fair opportunity to be heard.

(d) If any of you needs to communicate with me for any reason, write me a note and give it to (the bailiff) (court personnel). In your note do not disclose any vote or division among yourselves.

I will now give you a verdict form with questions you must answer. Consider your answer to each of these questions as a separate verdict.

Nine or more of you must agree on the answer to any question for that answer to be your verdict. It is not necessary that the same nine or more of you agree on each verdict. Each question is separate.

If your answer to any question is unanimous, only the foreperson will sign the verdict form for that question. If your answer is not unanimous, but nine or more of you agree on that answer, each of you who agrees must sign the answer. Those who do not agree must not sign.

INTERROGATORIES (Illustrative Set)

(Insert signature lines after each interrogatory)

VERDICT FORM

1. Do you find from a preponderance of the evidence that there was a failure on the part of James Cranston to use the highest degree of care which was a proximate cause of any damages sustained by William Fairchild?

ANSWER: _____
(Yes or No)

2. Do you find from a preponderance of the evidence that there was

negligence on the part of James Cranston which was a proximate cause of any damages sustained by John Armstrong?

ANSWER: _____
(Yes or No)

3. Do you find from a preponderance of the evidence that there was negligence on the part of John Armstrong which was a proximate cause of any damages sustained by William Fairchild, James Cranston, or Reliable Taxi?

ANSWER: _____
(Yes or No)

4. Answer this interrogatory only if you have answered "Yes" to one or more of Interrogatories 1 through 3:

Do you find from a preponderance of the evidence that there was negligence on the part of William Fairchild which was a proximate cause of any damages he may have sustained?

ANSWER: _____
(Yes or No)

5. If you have answered more than one of Interrogatories 1 through 4 "Yes," then answer this Interrogatory:

Using 100% to represent the total responsibility for the occurrence and any injuries or damages resulting from it, apportion the responsibility between the parties whom you have found to be responsible.

[To assign a percentage of fault to James Cranston, you must have answered yes to either Questions 1 or 2; otherwise his percentage of fault is zero. To assign a percentage of fault to John Armstrong, you must have answered yes to Question 3; otherwise, his percentage of fault is zero. To assign a percentage of fault to William Fairchild, you must have answered yes to Question 4; otherwise his percentage of fault is zero.]

ANSWER:	_____	_____%
	James Cranston	_____
	_____	_____%
	John Armstrong	_____

 William Fairchild

Total 100%

6. State the amount of any damages which you find from a preponderance of the evidence were sustained by William Fairchild as a result of the occurrence.

ANSWER: \$ _____**

7. State the amount of any damages which you find from a preponderance of the evidence were sustained by James Cranston as a result of the occurrence.

ANSWER: \$ _____

8. State the amount of any damages which you find from a preponderance of the evidence were sustained by Reliable Taxi Company as a result of the occurrence.

ANSWER: \$ _____

9. State the amount of any damages which you find from a preponderance of the evidence were sustained by John Armstrong as a result of the occurrence.

ANSWER: \$ _____

* The trial court may want to submit only Interrogatories 1 through 4 initially in order to determine whether Interrogatory 5 need be submitted at all. If this procedure is followed, the introductory sentence to Interrogatory 5 should be omitted.

** The trial court may want the jury to answer fully only Interrogatories 1 through 4 or 1 through 5 as preferred, since these answers will be determinative.

III. MEDICAL MALPRACTICE CASE

STATEMENT OF FACTS

John Smith, a construction worker, strained himself while lifting heavy objects on his job. Mr. Smith consulted Dr. Jones, a physician and surgeon engaged in the general practice of medicine and surgery. Dr. Jones diagnosed the case as a left inguinal hernia and recommended surgery to repair it. John Smith consented to the surgery and entered the county hospital under the care of Dr. Jones. On the second hospital day Dr. Jones performed the operation. Following the operation John Smith did not void for twenty-four hours, and he had an elevated temperature. Attempts to catheterize the patient were unsuccessful. He was taken back to surgery and exploration revealed that infection and secondary edema had closed the urethra. The infected tissue was removed by Dr. Jones and the patient recovered; however, he was in the hospital a week longer than normal for a hernia repair and had permanent damage to his kidney and bladder. Smith brought suit against Dr. Jones alleging that the doctor did not properly sterilize his instruments.

A suggested set of instructions in recommended sequence:

**(AMI
number)**

1. 103. Respective Duties of Judge and Jury—Cautionary Instructions.
2. 105. Credibility of Witnesses.
3. 107. Expert Witnesses.
4. 108. Circumstantial Evidence.
5. 202. Meaning of Burden of Proof and Preponderance of the Evidence.
6. 203. Issues—Claim for Damages Based on Negligence—Burden of Proof.
7. 1501. Duty of Physician, Surgeon, Dentist or other Medical Care Provider.
8. 501. Proximate Cause—Concurring Proximate Cause—Definition.
9. 603. No Presumption of Negligence from Happening of Injury.
10. 2201. Measure of Damages—General Instruction.
 - (a) 2202. Measure of Damages—The Nature, Extent, Duration, and Permanency of the Injury.
 - (b) 2204. Measure of Damages—Medical Expense—Past and Future.
 - (c) 2205. Measure of Damages—Pain, Suffering, and Mental Anguish—Past and Future.

**(AMI
number)**

11. 2215. Measure of Damage—Collateral Sources.
12. 3501. Closing Instructions.

Text of Suggested Instructions**1. (AMI 103)**

- (a) The faithful performance of your duties as jurors is essential to the administration of justice.
- (b) It is my duty as judge to inform you of the law applicable to this case by instructions, and it is your duty to accept and follow them as a whole, not singling out one instruction to the exclusion of others. You should not consider any rule of law with which you may be familiar unless it is included in my instructions.
- (c) It is your duty to determine the facts from the evidence produced in this trial. You are to apply the law as contained in these instructions to the facts and render your verdict upon the evidence and law. You should not permit sympathy, prejudice, or like or dislike of any party to this action or of any attorney to influence your findings in this case.
- (d) In deciding the issues, you should consider the testimony of the witnesses and the exhibits received in evidence. The introduction of evidence in court is governed by law. You should accept without question my rulings as to the admissibility or rejection of evidence, drawing no inferences that by these rulings I have in any manner indicated my views on the merits of the case.
- (e) Opening statements, remarks during the trial, and closing arguments of the attorneys are not evidence but are made only to help you in understanding the evidence and applicable law. Any argument, statements, or remarks of attorneys having no basis in the evidence should be disregarded by you. However, an admission of fact by an attorney is binding on his or her client.
- (f) I have not intended by anything I have said or done, or by any question that I may have asked to intimate or suggest what you should find to be the facts, or that I believe or disbelieve any witness who testified. If anything that I have done or said has seemed to so indicate, you will disregard it.

2. (AMI 105)

You are the sole judges of the weight of the evidence and the credibility of the witnesses. In determining the credibility of any witness and the weight to be given his testimony, you may take into consideration his demeanor while on the witness stand, any prejudice for or against a party, his means of acquiring knowledge concerning any matter to which he testified, any interest he may have in the outcome of the case, and the consistency or inconsistency of his testimony, as well as its reasonableness or unreasonableness.

3. (AMI 107)

An expert witness is a person who has special knowledge, skill, experience, training, or education on the subject to which his or her testimony relates.

An expert witness may give an opinion on questions in controversy. You may consider the expert's opinion in the light of his or her qualifications and credibility, the reasons given for the opinion, and the facts and other matters upon which the opinion is based.

You are not bound to accept an expert opinion as conclusive, but should give it whatever weight you think it should have. You may disregard any opinion testimony if you find it to be unreasonable.

4. (AMI 108)

A fact in dispute may be proved by circumstantial evidence as well as by direct evidence. A fact is established by direct evidence when, for example, it is proved by witnesses who testify to what they saw, heard, or experienced. A fact is established by circumstantial evidence when its existence can reasonably be inferred from other facts proved in the case.

5. (AMI 202)

A party who has the burden of proof on a proposition must establish it by a preponderance of the evidence, unless the proposition is so established by other proof in the case. "Preponderance of the evidence" means the greater weight of evidence. The greater weight of evidence is not necessarily established by the greater number of witnesses testifying to any fact or state of facts. It is the evidence which, when weighed with that opposed to it, has more convincing force and is more probably true and accurate. If, upon any issue in the case, the evidence appears to be equally balanced, or if you cannot say upon which side it weighs heavier, you must resolve that question against the party who has the burden of proving it.

6. (AMI 203)

Mr. Smith claims damages from Dr. Jones, and has the burden of proving each of three essential propositions:

First, that he has sustained damages;

Second, that Dr. Jones was negligent;

And third, that such negligence was a proximate cause of Mr. Smith's damages.

If you find from the evidence in this case that each of these propositions has been proved, then your verdict should be for Mr. Smith; but if, on the other hand, you find from the evidence that any of these propositions has not been proved, then your verdict should be for Dr. Jones.

7. (AMI 1501)

In operating upon a patient, a surgeon must possess and apply with reasonable care the degree of skill and learning ordinarily possessed and used by members of his profession in good standing, engaged in the same type of service or specialty in the locality in which he practices, or in a similar locality. A failure to meet this standard is negligence.

In determining the degree of skill and learning the law required and in deciding whether Dr. Jones applied the degree of skill and learning which the law required, you may consider only the expert testimony provided by Dr. Jackson and Dr. Johnson.

In deciding whether any negligence of Dr. Jones was a proximate cause of injuries to Mr. Smith that would not otherwise have occurred, you may consider only the expert testimony provided by Dr. Jackson and Dr. Johnson.

In considering the evidence on any other issue in this case, you are not required to set aside your common knowledge, but you have a right to consider all the evidence in light of your own observations and experiences in the affairs of life.

8. (AMI 501)

The law frequently uses the expression "proximate cause," with which you may not be familiar. When I use the expression "proximate cause," I mean a cause which, in a natural and continuous sequence, produces damage and without which damage would not have occurred.

9. (AMI 603)

The fact that an injury occurred is not, of itself, evidence of negligence on the part of anyone.

10. (AMI 2201)

If you decide for Mr. Smith on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate him for any of the following three elements of damage sustained which you find were proximately caused by the negligence of Dr. Jones:

(a) (AMI 2202) First: The nature, extent, duration, and permanency of any injury.

(b) (AMI 2204) Second: The reasonable expense of any necessary medical care, treatment, and services received.

(c) (AMI 2205) Third: Any pain and suffering experienced in the past and reasonably certain to be experienced in the future.

(End of AMI 2201) Whether any of these three elements of damage has been proved by the evidence is for you to determine.

11. (AMI 2215)

In assessing the damages of Mr. Smith, do not reduce the amount of the damages by any payment or benefit received or to be received by, or on behalf of Mr. Smith. Any reduction required by law will be made by the Court.

12. (AMI 3501)

You have now heard all the evidence and the instructions on the law you must apply in reaching your verdict. You soon will hear the lawyers' closing arguments and then go to the jury room to decide this case. I have a few final instructions for you on how to proceed.

(a) Remember that *you are to decide this case fairly, based only on the evidence presented in this courtroom and the law as instructed by me.* Do not consider information from any other source. And do not allow sympathy, prejudice, or like or dislike of any party or any attorney in this case to influence your decision. Keep in mind that the Basic Rule I have explained to you throughout the trial continues to apply during your deliberations: *You are to discuss the case only among yourselves. Do not communicate about this case and the places and persons involved by any means whatsoever with anyone else at all, or look for or receive any information whatsoever about this case—including through Electronic Devices—other than the evidence in this courtroom and the law as I have instructed you, until your jury duty is complete and I have discharged you.*

(b) Any notes you may have taken during the trial may be taken to

the jury room to use during your deliberations. Your notes are simply an aid to your own memory, and neither your notes nor those of any other juror are a substitute for your own memory or other jurors' memory. Leave your notes in the jury room when you have concluded your deliberations.

(c) Do not begin deliberations until all of you are assembled in the jury room. Once you are all there, the first thing for you to do is to elect one of you to act as foreperson during your deliberations. The foreperson should see to it that your discussions are orderly and that every one of you has a fair opportunity to be heard.

(d) If any of you needs to communicate with me for any reason, write me a note and give it to (the bailiff) (court personnel). In your note do not disclose any vote or division among yourselves.

At least nine of you must agree to arrive at a verdict.

If your verdict is unanimous, only the foreperson will sign your verdict form.

If your verdict is not unanimous, but nine or more of you agree on the verdict, then each of you who agrees must sign the verdict form. Those of you who do not agree must not sign the verdict form.

VERDICT FORM

We, the Jury find in favor of John Smith, the plaintiff, and against Dr. Jackson, the defendant, and award damages in the following amount:

\$ _____

Foreperson

Date

VERDICT FORM

We, the Jury find in favor of Dr. Jackson, the defendant, and against John Smith, the plaintiff.

Foreperson

Date

IV. BASIC CONTRACT DISPUTE

STATEMENT OF FACTS

John Smith was solicited by ABC Siding Company, Inc. ("ABC") to install siding on his home. Smith and ABC verbally agreed that ABC would install siding. ABC then presented a document entitled "Quotation" which Smith signed. The "Quotation" also referred to the installation of windows, a task omitted from the original solicitation. ABC installed the siding but Smith objected when ABC delivered windows for installation, contending that he never agreed to have windows installed. Smith refused to pay ABC any amount, and ABC brought suit against Smith for breach of contract.

A suggested set of instructions in recommended sequence:

	(AMI number)	
1.	103.	Respective Duties of Judge and Jury—Cautionary Instructions.
2.	104.	Jury—Personal Observations and Experiences.
3.	105.	Credibility of Witnesses.
4.	108.	Circumstantial Evidence.
5.	202.	Meaning of Burden of Proof and Preponderance of the Evidence.
6.	2401.	Issues—Breach of Contract.
7.	2402.	Issues—Contract Formation.
8.	2405.	Definition—Offer and Acceptance.
9.	2406.	Definition—Consideration.
10.	2407.	Definition—Reasonably Certain.
11.	2427.	Breach.
12.	2442.	Damages—General Rule.
13.	3501.	Closing Instructions.

Text of Suggested Instructions

1. (AMI 103)

- (a) The faithful performance of your duties as jurors is essential to the administration of justice.
- (b) It is my duty as judge to inform you of the law applicable to this case by instructions, and it is your duty to accept and follow them as a whole, not singling out one instruction to the exclusion of others. You should not consider any rule of

law with which you may be familiar unless it is included in my instructions.

- (c) It is your duty to determine the facts from the evidence produced in this trial. You are to apply the law as contained in these instructions to the facts and render your verdict upon the evidence and law. You should not permit sympathy, prejudice, or like or dislike of any party to this action or of any attorney to influence your findings in this case.
- (d) In deciding the issues, you should consider the testimony of the witnesses and the exhibits received in evidence. The introduction of evidence in court is governed by law. You should accept without question my rulings as to the admissibility or rejection of evidence, drawing no inferences that by these rulings I have in any manner indicated my views on the merits of the case.
- (e) Opening statements, remarks during the trial, and closing arguments of the attorneys are not evidence but are made only to help you in understanding the evidence and applicable law. Any argument, statements, or remarks of attorneys having no basis in the evidence should be disregarded by you. However, an admission of fact by an attorney is binding on his or her client.
- (f) I have not intended by anything I have said or done, or by any questions that I may have asked, to intimate or suggest what you should find to be the facts, or that I believe or disbelieve any witness who testified. If anything that I have done or said has seemed to so indicate, you will disregard it.

2. (AMI 104)

In considering the evidence in this case you are not required to set aside your common knowledge, but you have a right to consider all the evidence in the light of your own observations and experiences in the affairs of life.

3. (AMI 105)

You are the sole judges of the weight of the evidence and the credibility of the witnesses. In determining the credibility of any witness and the weight to be given his testimony, you may take into consideration his demeanor while on the witness stand, any prejudice for or against a party, his means of acquiring knowledge concerning any matter to which he testified, any interest he may have in the outcome of the

case, and the consistency or inconsistency of his testimony, as well as its reasonableness or unreasonableness.

4. (AMI 108)

A fact in dispute may be proved by circumstantial evidence as well as by direct evidence. A fact is established by direct evidence when, for example, it is proved by witnesses who testify to what they saw, heard, or experienced. A fact is established by circumstantial evidence when its existence can reasonably be inferred from other facts proved in the case.

5. (AMI 202)

A party who has the burden of proof on a proposition must establish it by a preponderance of the evidence, unless the proposition is so established by other proof in the case. "Preponderance of the evidence" means the greater weight of evidence. The greater weight of evidence is not necessarily established by the greater number of witnesses testifying to any fact or state of facts. It is the evidence which, when weighed with that opposed to it, has more convincing force and is more probably true and accurate. If, upon any issue in the case, the evidence appears to be equally balanced, or if you cannot say upon which side it weighs heavier, you must resolve that question against the party who has the burden of proving it.

6. (AMI 2401)

ABC claims that Mr. Smith breached a contract and has the burden of proving each of four essential propositions:

First, that ABC and Mr. Smith entered into a contract;

Second, that the contract required Mr. Smith to perform or not to perform a certain act;

Third, that ABC did what the contract required of it; and

Fourth, that Mr. Smith did not do what the contract required of him.

If you find that ABC has proved each of these propositions, then your verdict should be for ABC. If, however, ABC has failed to prove any one or more of these propositions, then your verdict should be for Mr. Smith.

7. (AMI 2402)

To establish a contract, ABC has the burden of proving each of three essential propositions:

First, that ABC made an offer to enter into a contract that was accepted by Mr. Smith;

Second, that there was an exchange of consideration; and

Third, that at the time the contract was made, its essential terms were reasonably certain and agreed to by both ABC and Mr. Smith.

8. (AMI 2405)

When I use the word “offer,” I mean a proposal to enter into a contract that invites acceptance by the party to whom it is directed. An offer must be communicated by words or conduct to the other party.

A party “accepts” an offer when he demonstrates his unconditional agreement to the terms of the offer. “Acceptance” may reasonably be implied from words or conduct, and it must occur before the offer is withdrawn or lapses.

9. (AMI 2406)

When I use the term “consideration,” I mean something of value that must be bargained for and given in exchange for a promise.

“Something of value” may consist of a promise—such as a promise to pay money or to perform a service or to deliver goods; an act—such as the payment of money, the delivery of goods or the performance of services; or a forbearance—such as giving up the right to use, the right to compete, or the right to perform a certain act.

10. (AMI 2407)

When I say the contract’s essential terms must be “reasonably certain,” I mean that the terms must provide a basis for determining the existence of a breach and for giving an appropriate remedy.

11. (AMI 2427)

The parties dispute whether Mr. Smith did what the contract required of him. A party’s failure to do what the contract required of him is a “breach” of the contract.

12. (AMI 2442)

If you decide for ABC on the question of liability, you must then fix the amount of money that ABC proved will reasonably and fairly compensate it for the element of damage resulting from Mr. Smith’s breach of the contract. In order to fairly compensate ABC, any award

should put ABC in no better position than it would have been in if both ABC and Mr. Smith had performed all of their promises under the contract.

The element of damage that ABC claims is:

The amount, if any, which you find Mr. Smith contracted to pay to ABC.

Whether this element of damage has been proved by the evidence is for you to determine.

13. (AMI 3501)

You have now heard all the evidence and the instructions on the law you must apply in reaching your verdict. You soon will hear the lawyers' closing arguments and then go to the jury room to decide this case. I have a few final instructions for you on how to proceed.

(a) Remember that *you are to decide this case fairly, based only on the evidence presented in this courtroom and the law as instructed by me*. Do not consider information from any other source. And do not allow sympathy, prejudice, or like or dislike of any party or any attorney in this case to influence your decision. Keep in mind that the Basic Rule I have explained to you throughout the trial continues to apply during your deliberations: *You are to discuss the case only among yourselves. Do not communicate about this case and the places and persons involved by any means whatsoever with anyone else at all, or look for or receive any information whatsoever about this case—including through Electronic Devices—other than the evidence in this courtroom and the law as I have instructed you, until your jury duty is complete and I have discharged you.*

(b) Any notes you may have taken during the trial may be taken to the jury room to use during your deliberations. Your notes are simply an aid to your own memory, and neither your notes nor those of any other juror are a substitute for your own memory or other jurors' memory. Leave your notes in the jury room when you have concluded your deliberations.

(c) Do not begin deliberations until all of you are assembled in the jury room. Once you are all there, the first thing for you to do is to elect one of you to act as foreperson during your deliberations. The foreperson should see to it that your discussions are orderly and that every one of you has a fair opportunity to be heard.

(d) If any of you needs to communicate with me for any reason, write me a note and give it to (the bailiff) (court personnel). In your note do not disclose any vote or division among yourselves.

At least nine of you must agree to arrive at a verdict.

If your verdict is unanimous, only the foreperson will sign your verdict form.

If your verdict is not unanimous, but nine or more of you agree on the verdict, then each of you who agrees must sign the verdict form. Those of you who do not agree must not sign the verdict form.

VERDICT FORM

We, the Jury find in favor of ABC Siding Company, Inc., the plaintiff, and against John Smith, the defendant, and award damages in the following amount:

\$ _____

Foreperson

Date

VERDICT FORM

We, the Jury find in favor of John Smith, the defendant, and against, ABC Siding Company, Inc., the plaintiff.

Foreperson

Date

V. FIRST PARTY INSURANCE (MEDPAY DENIAL)**STATEMENT OF FACTS**

Anna Lee suffered injuries as a result of an automobile accident that occurred when Jack, Crazy Chester's dog, ran in front of her car. Ms. Lee sought and obtained chiropractic treatment as a result of this occurrence from Dr. Luke Friend. Her chiropractic bills amounted to \$5,000.00. At the time of the occurrence, Ms. Lee had a policy of automobile insurance with The Insurance Company of Nazareth. The insurance policy with Nazareth provided that Nazareth would pay up to \$5,000.00 of Anna Lee's medical treatment charges that are reasonable and necessary as a result of a car wreck. Nazareth's policy requires the insured to provide reasonable proof of incurred medical treatment charges. Anna Lee submitted her \$5,000.00 chiropractic bill to Nazareth under the policy and Nazareth denied the claim. Anna Lee filed suit against Nazareth alleging breach of contract. Nazareth retained Dr. Fanny to offer expert testimony as to whether Dr. Friend's chiropractic treatment was reasonable and necessary.

(AMI number)

- | | | |
|-----|-------|---|
| 1. | 103. | Respective Duties of Judge and Jury—Cautionary Instructions. |
| 2. | 104. | Jury—Personal Observations and Experiences. |
| 3. | 105. | Credibility of Witnesses. |
| 4. | 107. | Expert Witnesses. |
| 5. | 108. | Circumstantial Evidence. |
| 6. | 202. | Meaning of Burden of Proof and Preponderance of the Evidence. |
| 7. | 206. | Issues—Affirmative Defenses—Burden of Proof. |
| 8. | 2401. | Issues—Breach of Contract. |
| 9. | 2403. | No Dispute As To Existence of Contract. |
| 10. | 2442. | Damages—General Rule. |
| 11. | 3501. | Closing Instructions. |

Text of Suggested Instructions**1. (AMI 103)**

(a) The faithful performance of your duties as jurors is essential to the administration of justice.

(b) It is my duty as judge to inform you of the law applicable to this case by instructions, and it is your duty to accept and follow

them as a whole, not singling out one instruction to the exclusion of others. You should not consider any rule of law with which you may be familiar unless it is included in my instructions.

(c) It is your duty to determine the facts from the evidence produced in this trial. You are to apply the law as contained in these instructions to the facts and render your verdict upon the evidence and law. You should not permit sympathy, prejudice, or like or dislike of any party to this action or of any attorney to influence your findings in this case.

(d) In deciding the issues, you should consider the testimony of the witnesses and the exhibits received in evidence. The introduction of evidence in court is governed by law. You should accept without question my rulings as to the admissibility or rejection of evidence, drawing no inferences that by these rulings I have in any manner indicated my views on the merits of the case.

(e) Opening statements, remarks during the trial, and closing arguments of the attorneys are not evidence but are made only to help you in understanding the evidence and applicable law. Any argument, statements, or remarks of attorneys having no basis in the evidence should be disregarded by you. However, an admission of fact by an attorney is binding on his or her client.

(f) I have not intended by anything I have said or done, or by any questions that I may have asked, to intimate or suggest what you should find to be the facts, or that I believe or disbelieve any witness who testified. If anything that I have done or said has seemed to so indicate, you will disregard it.

2. (AMI 104)

In considering the evidence in this case you are not required to set aside your common knowledge, but you have a right to consider all the evidence in the light of your own observations and experiences in the affairs of life.

3. (AMI 105)

You are the sole judges of the weight of the evidence and the credibility of the witnesses. In determining the credibility of any witness and the weight to be given his testimony, you may take into consideration his demeanor while on the witness stand, any prejudice for or against a party, his means of acquiring knowledge concerning any matter to which he testified, any interest he may have in the outcome of the case, and the consistency or inconsistency of his testimony, as well as its reasonableness or unreasonableness.

4. (AMI 107)

An expert witness is a person who has special knowledge, skill, experience, training, or education on the subject to which his testimony relates.

An expert witness may give an opinion on questions in controversy. You may consider the expert's opinion in the light of his qualifications and credibility, the reasons given for the opinion, and the facts and other matters upon which the opinion is based.

You are not bound to accept an expert opinion as conclusive but should give it whatever weight you think it should have. You may disregard any opinion testimony if you find it to be unreasonable.

5. (AMI 108)

A fact in dispute may be proved by circumstantial evidence as well as by direct evidence. A fact is established by direct evidence when, for example, it is proved by witnesses who testify to what they saw, heard, or experienced. A fact is established by circumstantial evidence when its existence can reasonably be inferred from other facts proved in the case.

6. (AMI 202)

A party who has the burden of proof on a proposition must establish it by a preponderance of the evidence, unless the proposition is so established by other proof in the case. "Preponderance of the evidence" means the greater weight of evidence. The greater weight of evidence is not necessarily established by the greater number of witnesses testifying to any fact or state of facts. It is the evidence which, when weighed with that opposed to it, has more convincing force and is more probably true and accurate. If, upon any issue in the case, the evidence appears to be equally balanced, or if you cannot say upon which side it weighs heavier, you must resolve that question against the party who has the burden of proving it.

7. (AMI 206) (MODIFIED)

The Insurance Company of Nazareth contends that the \$5,000.00 in chiropractor charges of Anna Lee was unreasonable and unnecessary. The Insurance Company of Nazareth has the burden of proving this contention.

8. (AMI 2401) (MODIFIED)

Anna Lee claims that The Insurance Company of Nazareth

breached a contract. The Parties stipulate to each of the following propositions:

First, that Anna Lee was injured while occupying her vehicle;

Second, that Anna Lee received chiropractic treatment for said injury; and,

Third, that The Insurance Company of Nazareth did not pay \$5,000.00 of benefits from her coverage within 30 days after proof was received by The Insurance Company of Nazareth.

Anna Lee has the burden of proving the following essential proposition:

That she gave reasonable proof of expenses for her chiropractic treatment totaling \$5,000.00 to The Insurance Company of Nazareth.

If you find that Anna Lee has proved this proposition and that The Insurance Company of Nazareth has not proved that the disputed \$5,000.00 in charges were unreasonable or unnecessary, then your verdict should be for Anna Lee. If, however, Anna Lee has failed to prove this proposition, then your verdict should be for The Insurance Company of Nazareth.

9. (AMI 2403)

The parties do not dispute that Anna Lee and The Insurance Company of Nazareth entered into a contract.

10. (AMI 2442)

If you decide for Anna Lee on the question of liability, you must then fix the amount of money that Anna Lee proved will reasonably and fairly compensate her for the element of damage resulting from The Insurance Company of Nazareth's breach of contract. The element of damage that Anna Lee claims is:

\$5,000.00 for chiropractic treatment.

Whether this element of damage has been proved by the evidence is for you to determine.

11. (AMI 3501)

You have now heard all the evidence and the instructions on the law you must apply in reaching your verdict. You soon will hear the lawyers' closing arguments and then go to the jury room to decide this case. I have a few final instructions for you on how to proceed.

(a) Remember that *you are to decide this case fairly, based only on the evidence presented in this courtroom and the law as instructed by*

me. Do not consider information from any other source. And do not allow sympathy, prejudice, or like or dislike of any party or any attorney in this case to influence your decision. Keep in mind that the Basic Rule I have explained to you throughout the trial continues to apply during your deliberations: You are to discuss the case only among yourselves. Do not communicate about this case and the places and persons involved by any means whatsoever with anyone else at all, or look for or receive any information whatsoever about this case—including through Electronic Devices—other than the evidence in this courtroom and the law as I have instructed you, until your jury duty is complete and I have discharged you.

(b) Any notes you may have taken during the trial may be taken to the jury room to use during your deliberations. Your notes are simply an aid to your own memory, and neither your notes nor those of any other juror are a substitute for your own memory or other jurors' memory. Leave your notes in the jury room when you have concluded your deliberations.

(c) Do not begin deliberations until all of you are assembled in the jury room. Once you are all there, the first thing for you to do is to elect one of you to act as foreperson during your deliberations. The foreperson should see to it that your discussions are orderly and that every one of you has a fair opportunity to be heard.

(d) If any of you needs to communicate with me for any reason, write me a note and give it to (the bailiff) (court personnel). In your note do not disclose any vote or division among yourselves.

At least nine of you must agree to arrive at a verdict.

If your verdict is unanimous, only the foreperson will sign your verdict form.

If your verdict is not unanimous, but nine or more of you agree on the verdict, then each of you who agrees must sign the verdict form. Those of you who do not agree must not sign the verdict form.

VERDICT FORM

We, the Jury find in favor of Anna Lee, the plaintiff, and against The Insurance Company of Nazareth, the defendant, and award damages in the following amount:

\$ _____

Foreperson

Date

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

VERDICT FORM

We, the Jury find in favor of The Insurance Company of Nazareth,
the defendant and against Anna Lee, the plaintiff.

Foreperson

Date

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

VERDICT FORM

CROSS-REFERENCE TABLES

AMI 4TH TO AMI 2012

Only instructions that appeared in AMI 4th and have been re-numbered in AMI 2012 are listed.

AMI 4th	AMI 2012	AMI 4th	AMI 2012
106	107	911	912
107	108	912	913
108	109	913	914
109	110	2301	3501
406	2304	2302	3502
409A	410	2303	3503
410	411	2401	Chapter 36, I
411	412	2402	Chapter 36, II
412	413	2403	Chapter 36, III
413	414	3001	2401
414	415	3002	2402
415	416	3003	2403
416	417	3004	2404
417	418	3005	2405
418	419	3006	2406
419	420	3007	2407
420	421	3008	2408
421	422	3009	2409
422	423	3010	2410
423	424	3011	2411
424	425	3012	2412
905A	906	3013	2413
906	907	3014	2414
907	908	3015	2415
908	909	3016	2416
909	910	3017	2417
910	911	3018	2418

CROSS-REFERENCE TABLES

Ch. 36

AMI 4th	AMI 2012	AMI 4th	AMI 2012
3019	2419	3302	2802
3020	2420	3303	2803
3021	2421	3304	2804
3022	2422	3305	2805
3023	2423	3306	2806
3024	2424	3307	2807
3025	2425	3400	2900
3026	2426	3401	2901
3027	2427	3402	2902
3028	2428	3403	2903
3029	2429	3501	2501
3030	2430	3502	2502
3031	2431	3503	2503
3032	2432	3504	2504
3033	2433	3505	2505
3034	2434	3506	2506
3035	2435	3507	2507
3036	2436	3508	2508
3037	2437	3509	2509
3038	2438	3510	2510
3039	2439	3511	2511
3040	2440	3512	2512
3041	2441	3513	2513
3042	2442	3514	2514
3043	2443	3515	2515
3044	2444	3516	2516
3100	2600	3517	2517
3101	2601	3518	2518
3102	2602	3519	2519
3103	2603	3520	2520
3104	2604	3521	2521
3200	2700	3522	2522
3201	2701	3523	2523
3202	2702	3524	2524
3203	2703	3525	2525
3204	2704	3526	2526
3205	2705	3527	2527
3206	2706	3528	2528
3300	2800	3529	2529
3301	2801		

PREVIOUS AMI TO AMI 4TH

Previous AMI numbers that do not list corresponding AMI 4th numbers have been withdrawn with or prior to publication of AMI 4th.

Previous AMI Number	AMI 4th	Previous AMI Number	AMI 4th
101A [New]	101	907	908
101B [New]	102	908	909
101	103	909	910
102	104	910	911
103	105	911	912
103A [New]	106	1008A [New]	1009
104	107	1009	1010
105	108	1010	1011
106	109	1011	1012
301	302	1012	1013
306	301	1013 [Revised]	1014
401	—	1014 [New]	1015
402	—	1101A [New]	—
403	—	1102 [Revised]	—
404	401	1103	—
405 [Revised]	402	1103 [Revised]	1103
406 [New]	403	1104	—
407 [New]	405	1104 [Revised]	1104
604	—	1104A	1105
605	604	1105	—
606	605	1105 [Revised]	1106
607	606	1106	—
608	607	1106 [Revised]	1107
609	608	1106 [New]	—
610	609	1107	1108
611	610	1108	1109
612	—	1109	1110
613	—	1202	—
614	—	1203	1202
615	611	1204	1203
616	612	1501	—
617	—	1501 [Revised]	1501
905A	906	1502A	1503
906	907	1503	1504

Previous AMI Number	AMI 4th	Previous AMI Number	AMI 4th
1504	1505	2215	2216
1505	1506	2215A [New]	2216
1506	1507	2216	2217
2101	2101	2216A [New]	2217
2102	2102	2217	2218
2103	2103	2218	2219
2104	2104	2219	2220
2105	2105	2220	2221
2106	2106	2221	2222
2107	2107	2222	2223
2108	2108	2223	2224
2109	2109	2224	2225
2110	2110	2225	2226
2111	2111	2226	2227
2112	2112	2227	2228
2113	2113	2228	2229
2114	2114	2229	2230
2214A [New]	2215		

AMI 4TH TO PREVIOUS AMI

Only numbers in AMI 4th that are different from those of, or do not appear in, previous editions are listed.

AMI 4th numbers that do not list a corresponding previous AMI number are new instructions.

AMI 4th Number	Previous AMI Number	AMI 4th Number	Previous AMI Number
101	101A [New]	607	608
102	101B [New]	608	609
103	101	609	610
104	104	610	611
105	103	611	615
106	103A [New]	612	616
107	104	906	905A
108	105	907	906
109	106	908	907
301	306	909	908
302	301	910	909
306	—	911	910
401	404	912	911
402	405 [Revised]	913	912
403	406 [New]	1009	1008A [New]
404	—	1010	1009
405	407 [New]	1011	1010
406	—	1012	1011
407	—	1013	1012
408	—	1014	1013 [Revised]
409	—	1015	1014 [Revised]
410	—	1103	1103 [Revised]
411	—	1104	1104 [Revised]
412	—	1105	1104A
413	—	1106	1105 [Revised]
414	—	1107	1106 [Revised]
415	—	1108	1107
416	—	1109	1108
417	—	1110	1109
418	—	1202	1203
604	605	1203	1204
605	606	1501	1501 [Revised]
606	607	1503	502A

AMI 4th Number	Previous AMI Number	AMI 4th Number	Previous AMI Number
1504	1503	2110	2111
1505	1504	2215	2214A [New]
1506	1505	2216	2215A [New]
1507	1506	2217	2216A [New]
1508	—	2218	2217
1509	—	2219	2218
1510	—	2220	2219
1511	—	2221	2220
1512	—	2222	2221
1513	—	2223	2222
2101	2102	2224	2223
2102	2103	2225	2224
2103	2104	2226	2225
2104	2105	2227	2226
2105	2106	2228	2227
2106	2107	2229	2228
2107	2108	2230	2229
2108	2109	2231	—
2109	2110		

Table of Laws and Rules

UNITED STATES CONSTITUTION

	This work
	Instr. No.
Amend 1	422, 423

CIVIL JUSTICE REFORM ACT

Sec.	This work
	Instr. No.
15(b)	2204, 2215

SECURITIES EXCHANGE ACT OF 1934

Sec.	This work
	Instr. No.
10(b)	2700

UNITED STATES CODE ANNOTATED

15 U.S.C.A. Sec.	This work	29 U.S.C.A. Sec.	This work
	Instr. No.		Instr. No.
78j(b)	2700	1144(b)(2)(A)	2304
29 U.S.C.A. Sec.	This work	45 U.S.C.A. Sec.	This work
	Instr. No.		Instr. No.
1001 et seq.	2304	421-447	1803
1144(a)	2304	434	1803

CODE OF FEDERAL REGULATIONS

49 C.F.R. Sec.	This work	49 C.F.R. Sec.	This work
	Instr. No.		Instr. No.
213.9(a)	1803	382.303	2218
376.12(c)(4)	707		

FEDERAL RULES OF EVIDENCE

Rule	This work Instr. No.
411	2303

ARKANSAS CONSTITUTION

	This work Instr. No.		This work Instr. No.
Art. 4, § 2	203, 206, 501, 502	Amend 80	2444, 2445
Art. 5, § 32	2218	Amend 80, § 3	203, 206, 501, 502, 2204, 2215
Art. 2, Amend 16, § 7.....	3501		

ARKANSAS CODE ANNOTATED

Sec.	This work Instr. No.	Sec.	This work Instr. No.
2-38-301	1601	4-2-316(3).....	2514
4-1-201(10)	2514	4-2-316(3)(b).....	2514
4-1-205(b)	2503, 2505	4-2-316(3)(c).....	2514
4-1-207	2437	4-2-318	2507
4-1-303	2511	4-2-508	2516
4-2-104(1).....	2506	4-2-601.....	2515
4-2-105	2501	4-2-602.....	2516, 2518
4-2-106	2430	4-2-606	2516, 2517
4-2-106(1).....	2501	4-2-606(1)(c)	2517
4-2-204	2501	4-2-607	2517
4-2-204(3).....	2501	4-2-607, Comment 4	1010, 2507
4-2-205	2504	4-2-607(2).....	2517
4-2-206(1).....	2503	4-2-607(3)(a)	1010, 1012, 2507
4-2-206(2).....	2504	4-2-608	2516, 2518
4-2-207(1).....	2505	4-2-610	2427
4-2-207(2).....	2505	4-2-611	2427
4-2-207(3).....	2501	4-2-612	2516
4-2-209	2425, 2511	4-2-614	2439, 2441
4-2-302	2435	4-2-615	2439, 2441
4-2-312	2501, 2512	4-2-616	2439, 2441
4-2-313	1012, 2501, 2507, 2508	4-2-703	2523
4-2-314	1010, 2501, 2507	4-2-706	2524, 2526
4-2-314(1).....	2509	4-2-706(2) to (6)	2526
4-2-314(2).....	2509	4-2-708.....	2524, 2525
4-2-314(2)(a).....	1010	4-2-708(2).....	2524
4-2-314(3).....	2510	4-2-709	2524, 2525
4-2-315	1011, 2501, 2507, 2513	4-2-710	2527
4-2-316	2514	4-2-711	2519
4-2-316(1)	2508, 2514	4-2-712	2519
4-2-316(2).....	2514	4-2-712(3).....	2519

ARKANSAS CODE ANNOTATED—Continued

Sec.	This work Instr. No.	Sec.	This work Instr. No.
4-2-713	2519	4-74-602(a)	2602
4-2-714	2520	4-75-601	2600, 2601, 2602, 2603
4-2-714(1)	2520	4-75-601(4)	2602
4-2-714(2)	2507, 2520	4-75-606	2604
4-2-715	2443, 2520, 2522	4-75-606(b)	2604
4-2-715(1)	2521	4-86-101	1001
4-2-715(2)	2522	4-86-102	1008
4-2-715(2)(a)	2519, 2522	4-86-102(c)(2)	1205
4-2-719	2529	4-86-102(c)(2)(A)	1008
4-2-719(1)(b)	2529	4-88-101	2900
4-2-719(2)	2529	4-88-102	2901
4-2-719(3)	2529	4-88-102(5)	2900, 2901
4-2-723	2528	4-88-105(c)	2901
4-2-723(3)	2528	4-88-107	2900, 2902
4-3-103(a)(5)	3005	4-88-107(a)(5)	2901
4-3-103(a)(8)	3004	4-88-113(d)(1)	2903
4-3-301	3001	4-88-113(f)	601, 2900
4-3-311	2431	4-89-101 et seq.	2801
4-3-403	3001	5-53-2110	106
4-3-406	3001, 3002, 3006	5-53-2111	106
4-3-420	425, 3001	5-62-122	1601
4-4-103	3004	5-65-102	606
4-4-103(a)	3001	9-25-102	801
4-4-103(b)	3001	15-32-301	2228A
4-4-103(c)	3001	16-22-304	2445
4-4-103(e)	3002	16-22-308	1205
4-4-406	3001, 3002, 3003	16-22-310 et seq.	1510
4-4-406(f)	3003	16-22-310	1510
4-9-609	425	16-22-310(a)	1510
4-46-101(6)	710	16-55-201 et seq.	1501, 2218
4-46-202	711	16-55-201	2110
4-72-202(1)(A)	2801	16-55-201(1)	307
4-72-202(1)(B)	2801	16-55-201(a)	307, 425, 2303
4-72-202(2)	2803	16-55-202	203, 206, 501, 502, 2301
4-72-202(3)	2803	16-55-205	713, 714
4-72-202(4)	2803	16-55-206	2218
4-72-202(5)	2807	16-55-207	202
4-72-202(6)	2801	16-55-208	2218
4-72-202(7)	2802	16-55-210	2218
4-72-202(8)	2804	16-55-211	2218
4-72-204(a)	2800	16-55-212(b)	2204, 2215
4-72-204(a)(1)	2802	16-56-112	1203, 1205, 1206
4-72-206	2805	16-62-101	420, 421, 422, 423, 2216, 2217
4-72-206(1)	2805	16-62-102	2216, 2217
4-72-207	2806	16-62-102(a)	2217
4-72-208	2806	16-64-122	1602, 2101, 2102, 2103,
4-72-301 et seq.	2802		

ARKANSAS CODE ANNOTATED—Continued

Sec.	This work Instr. No.	Sec.	This work Instr. No.
	2104, 2105, 2106, 2107, 2108, 2109	23-42-101 et seq.	2700
16-64-122(a)	501, 502	23-42-103	2703
16-64-122(c)	301, 306	23-42-103(5)	2703
16-64-122(d)	307A	23-42-106(a)(1)	2706
16-64-131	2206	23-42-106(a)(1)(B)	2700, 2702
16-114-201 et seq.	1501	23-42-106(b)(1)	2701, 2702, 2706
16-114-201	1501, 1504	23-42-106(c)	2704, 2705
16-114-201(2)	1508	23-42-106(f)	2702
16-114-201(3)	1504	23-42-106(g)	2702
16-114-203(b)	211	23-88-101	2305
16-114-206	2218	23-88-101(a)	2305
16-114-206(a)	1501	23-88-101(b)	2305
16-114-206(b)	1508	23-89-209	2303
16-114-206(b)(1)	1506	23-89-209(a)(1)	2303
16-114-206(b)(2)	1508	23-89-401 et seq.	2301
16-114-206(b)(2)(A)	1509	23-89-401	2301
16-114-206(b)(2)(B)	1509	23-89-402	2301
16-114-206(b)(2)(C)	1509	27-16-602	802
16-114-206(b)(2)(D)	1509	27-16-604	802
16-114-208(a)	2204, 2215	27-16-702(a)	803, 804
16-114-210	1503	27-16-702(b)	803
16-114-303	1510	27-16-702(c)	804
16-114-208 to 16-114-212	2218	27-19-503	2301
16-116-101 et seq.	1001	27-19-605	2303
16-116-102	1008	27-36-101	910
16-116-102(2)	1016	27-37-101	910
16-116-102(7)	1017	27-37-202	913, 914
16-116-105	1014, 1015	27-37-202(e)	913
16-116-201	1017	27-37-703	601, 903
16-126-103	1901	27-49-109	913
16-126-104	1902	27-49-110	903, 1202
18-11-301 et seq.	1103, 1104, 1108	27-49-211	909
18-11-301	1102, 1103, 1104, 1107	27-49-212(d)	802, 803, 804
18-11-302	1108	27-49-219(d)	913
18-11-307(1)	2218	27-51-201(a)(1)	901
18-60-102	425, 2226A	27-51-202(a)	913
18-60-107	1102, 1103, 1104, 1107	27-51-204(b)(1)	913
20-10-1209(a)(1)	1501	27-51-306	902
21-1-602(2)	3101	27-51-403	902
21-1-602(2)(A)	3101	27-51-404	902
21-1-602(3)	3101	27-51-501	904, 906
21-1-602(4)	3101	27-51-503	905
21-1-602(5)	3101	27-51-503(b)	905, 906
21-1-602(6)	3101	27-51-503(c)	908
23-12-410	1801	27-51-503(c)(2)	603
23-12-907	1802	27-51-601	906
		27-51-703 to 27-51-705	1804

ARKANSAS CODE ANNOTATED—Continued

Sec.	This work Instr. No.	Sec.	This work Instr. No.
27-51-901	913	27-67-317(b)	2001
27-51-901(a)	914	106	1014
27-52-107	907	108	2902
27-52-108	907	207	2218
27-53-401	2210	1301	1108

ARKANSAS STATUTES ANNOTATED

Sec.	This work Instr. No.	Sec.	This work Instr. No.
16-22-310	709A	16-114-303	709A

ARKANSAS ACTS

Acts	This work Instr. No.	Acts	This work Instr. No.
§ 19(b)	2204	2003, No. 649, § 15(a)	2204
2003, No. 649	2218	2005, No. 928	1105
2003, No. 659	2204	2013, No. 1196	1501
2003, No. 1043	2301		

ARKANSAS RULES OF CIVIL PROCEDURE

Rule	This work Instr. No.	Rule	This work Instr. No.
9	307	49	307
9(h)	307	49(c)(1)(A)	307
37(b)(2)	106	49(c)(1)(B)	307
39(c)	2444	52	307
42(b)	2218		

ARKANSAS RULES OF EVIDENCE

Rule	This work Instr. No.	Rule	This work Instr. No.
403	2303	702	107
606(b)	2215		

ABA MODEL RULES OF PROFESSIONAL CONDUCT

Sec.	This work Instr. No.	Sec.	This work Instr. No.
3.4(a)	106	8.4(d)	106
8.4(c)	106		

UNIFORM COMMERCIAL CODE

Sec.	This work Instr. No.	Sec.	This work Instr. No.
Art. 2 .. 2415, 2416, 2417, 2418, 2423, 2443, 2516, 2518, 2522		Art. 4	3001
Art. 2, Part 3	2501	4-212	2445
		Art. 9	2445

RESTATEMENT THIRD, AGENCY

Sec.	This work Instr. No.
7.05	709A

RESTATEMENT THIRD, RESTITUTION AND UNJUST ENRICHMENT

Sec.	This work Instr. No.
40 to 44	2445

RESTATEMENT THIRD, UNFAIR COMPETITION

Sec.	This work Instr. No.
39	2602

RESTATEMENT SECOND, AGENCY

Sec.	This work Instr. No.	Sec.	This work Instr. No.
213	709A	220	707

TABLE OF LAWS AND RULES

RESTATEMENT SECOND, CONTRACTS

Sec.	This work Instr. No.	Sec.	This work Instr. No.
33(2).....	2407	204, Comment d.....	2423
58, Comment a.....	2409	205.....	2426
68.....	2408	205, Comment c.....	2426
69.....	2405	222.....	2417
90.....	2444	223.....	2416
139.....	2444	237, Comment d.....	2428
139(1).....	2444	241, Comment d.....	2428
175(2).....	2435	278.....	2431
177.....	2434	284.....	2432
203.....	2418	347, Comment e.....	2442
203, Comment e.....	2421	381.....	2435
203, Comment f.....	2422		

RESTATEMENT SECOND, TORTS

Sec.	This work Instr. No.	Sec.	This work Instr. No.
13.....	418	652E.....	423
21, Comment c.....	417	652F to 652G.....	422, 423, 424
308.....	608	652I.....	420, 421, 422, 423
317.....	709A	674, Comment c.....	413
332.....	1104	676.....	413
366.....	1110	766.....	403
390.....	608	766B.....	403
402(a).....	1008	767.....	404
402A, Comment k.....	1009	768 to 773.....	403, 404
551.....	402	768.....	403
611.....	410	769.....	404
652B.....	420	920A.....	2215
652C.....	421	922, Comment B.....	425
652D.....	422	927.....	425

RESTATEMENT, TORTS

Sec.	This work Instr. No.
339.....	1109

Table of Cases

A

- Abraham v. Jones, 228 Ark. 717, 310 S.W.2d 488 (1958)—§ 2219
- Acco Transp. Co. v. Smith, 207 Ark. 70, 178 S.W.2d 1011 (1944)—§§ 902, 2216
- Acker Const., LLC v. Tran, 2012 Ark. App. 214, 396 S.W.3d 279 (2012)—§ 2443
- Adams v. Adams, 228 Ark. 741, 310 S.W.2d 813 (1958)—§ 210
- Adams v. Wacaster Oil Co., Inc., 81 Ark. App. 150, 98 S.W.3d 832, 50 U.C.C. Rep. Serv. 2d 774 (2003)—§§ 1010, 2507
- Adams v. Wolf, 73 Ark. App. 347, 43 S.W.3d 757 (2001)—§§ 211, 212
- Addington v. Wal-Mart Stores, Inc., 81 Ark. App. 441, 105 S.W.3d 369 (2003)—§ 409
- Adkins v. Kelley, 244 Ark. 199, 424 S.W.2d 373 (1968)—§§ 2202, 2207, 2208
- Advocat, Inc. v. Sauer, 353 Ark. 29, 111 S.W.3d 346 (2003)—§ 2218
- Aetna Cas. and Sur. Co. v. Broadway Arms Corp., 281 Ark. 128, 664 S.W.2d 463 (1984)—§§ 403, 2304
- Ahrens v. Moore, 206 Ark. 1035, 178 S.W.2d 256 (1944)—§ 1006
- Airco, Inc. v. Simmons First Nat. Bank, Guardian, 276 Ark. 486, 638 S.W.2d 660, 34 A.L.R.4th 526 (1982)—§ 2218
- Air Evac EMS, Inc. v. USABLE Mutual Insurance Company, 2017 Ark. 368, 533 S.W.3d 572 (2017)—§ 2900
- Aka v. Jefferson Hosp. Ass'n, Inc., 344 Ark. 627, 42 S.W.3d 508 (2001)—§ 2217
- Akridge v. Park Bowling Center, Inc., 240 Ark. 538, 401 S.W.2d 204 (1966)—§ 1106
- Alaskan Oil, Inc. v. Central Flying Service, Inc., 975 F.2d 553 (8th Cir. 1992)—§ 1008
- Alexander v. Flake, 322 Ark. 239, 910 S.W.2d 190 (1995)—§ 211
- Alexander v. McEwen, 367 Ark. 241, 239 S.W.3d 519 (2006)—§ 2412
- Alexander v. Pathfinder, Inc., 189 F.3d 735 (8th Cir. 1999)—§ 424
- Alexander v. Town and Country Discount Foods, Inc., 316 Ark. 446, 872 S.W.2d 390 (1994)—§ 609
- Allen v. Johar, Inc., 308 Ark. 45, 823 S.W.2d 824 (1992)—§ 2602
- Allstate Ins. Co. v. Dodson, 2011 Ark. 19, 376 S.W.3d 414 (2011)—§§ 201, 1506, 2218
- All-Ways Logistics, Inc. v. USA Truck, Inc., 583 F.3d 511 (8th Cir. 2009)—§ 2437
- Alpha Zeta Chapter of Pi Kappa Alpha Fraternity by Damron v. Sullivan, 293 Ark. 576, 740 S.W.2d 127 (1987)—§ 1701
- Aluminum Co. of America v. Guthrie, 296 Ark. 269, 753 S.W.2d 538 (1988)—§ 1110

ARKANSAS MODEL JURY INSTRUCTIONS-CIVIL

- Amerdyne Industries, Inc. v. POM, Inc., 760 F.2d 875 (8th Cir. 1985)—
§ 2425
- American Auto. Auction Inc. v. Titsworth, 292 Ark. 452, 730 S.W.2d 499
(1987)—§ 709A
- American Cas. Co. of Reading, Pa. v. Mason, 312 Ark. 166, 848 S.W.2d
392 (1993)—§ 2303
- American Health Care Providers, Inc. v. O'Brien, 318 Ark. 438, 886
S.W.2d 588 (1994)—§ 2304
- American Ry. Express Co. v. Mackley, 148 Ark. 227, 230 S.W. 598
(1921)—§ 702
- American State Bank v. Union Planters Bank, N.A., 332 F.3d 533, 50
U.C.C. Rep. Serv. 2d 1157 (8th Cir. 2003)—§ 3002
- Amoco Production Co. v. Lindley, 1980 OK 6, 609 P.2d 733 (Okla.
1980)—§ 2602
- Anadarko Petroleum Co. v. Venable, 312 Ark. 330, 850 S.W.2d 302
(1993)—§ 2438
- Aon Risk Services, 100 Ark. App.—§ 2405
- Aon Risk Services, Inc. v. Meadors, 100 Ark. App. 272, 267 S.W.3d 603
(2007)—§§ 2401, 2402, 2405, 2407, 2409
- Argo v. Blackshear, 242 Ark. 817, 416 S.W.2d 314 (1967)—§ 307A
- Arkansas & L. Ry. Co. v. Sain, 90 Ark. 278, 119 S.W. 659 (1909)—§ 1102
- Arkansas Bank & Trust Co. v. Erwin, 300 Ark. 599, 781 S.W.2d 21
(1989)—§ 608
- Arkansas Carpenters' Health & Welfare Fund v. Philip Morris, Inc., 75
F. Supp. 2d 936 (E.D. Ark. 1999)—§ 1011
- Arkansas General Utilities Co. v. Shipman, 188 Ark. 580, 67 S.W.2d 178
(1934)—§§ 1401, 1405
- Arkansas Light & Power Co. v. Cullen, 167 Ark. 379, 268 S.W. 12
(1925)—§ 1401
- Arkansas Light & Power Co. v. Jackson, 166 Ark. 633, 267 S.W. 359
(1924)—§ 1405
- Arkansas Louisiana Gas Co. v. Stracener, 239 Ark. 1001, 395 S.W.2d
745 (1965)—§ 601
- Arkansas Midland R. Co. v. Pearson, 98 Ark. 399, 135 S.W. 917
(1911)—§ 1503
- Arkansas Oklahoma Gas Corp. v. Burton, 10 Ark. App. 419, 664 S.W.2d
894 (1984)—§ 2009
- Arkansas Pools, Inc. v. Beavers, 281 Ark. 109, 661 S.W.2d 395 (1983)—
§ 709
- Arkansas Power & Light Co. v. Butterworth, 222 Ark. 67, 258 S.W.2d 36
(1953)—§ 609
- Arkansas Power & Light Co. v. Cates, 180 Ark. 1003, 24 S.W.2d 846
(1930)—§ 1402
- Arkansas Power & Light Co. v. Childers, 253 Ark. 894, 489 S.W.2d 776
(1973)—§ 2008
- Arkansas Power & Light Co. v. Connelly, 185 Ark. 693, 49 S.W.2d 387
(1932)—§ 2212
- Arkansas Power & Light Co. v. Hoover, 182 Ark. 1065, 34 S.W.2d 464
(1931)—§ 1402

TABLE OF CASES

- Arkansas Power & Light Co. v. Llewellyn, 268 Ark. 839, 595 S.W.2d 712 (Ct. App. 1980)—§ 2012
- Arkansas Power & Light Co. v. Lum, 222 Ark. 678, 262 S.W.2d 920 (1953)—§§ 1401, 1402
- Arkansas Power & Light Co. v. Steinheil, 190 Ark. 470, 80 S.W.2d 921 (1935)—§ 1702
- Arkansas Power & Light Co. v. Thompson, 196 Ark. 1012, 120 S.W.2d 709 (1938)—§ 1404
- Arkansas Research Medical Testing, LLC v. Osborne, 2011 Ark. 158, 2011 WL 1423993 (2011)—§§ 2304, 2426
- Arkansas Short Line v. Bellars, 176 Ark. 53, 2 S.W.2d 683 (1928)—§§ 1102, 1103
- Arkansas State Highway Commission v. Alvin Samuel Gin Co., Inc., 256 Ark. 669, 510 S.W.2d 65 (1974)—§ 2011
- Arkansas State Highway Commission v. Darr, 246 Ark. 204, 437 S.W.2d 463 (1969)—§ 2009
- Arkansas State Highway Commission v. Davis, 245 Ark. 813, 434 S.W.2d 605 (1968)—§ 2002
- Arkansas State Highway Commission v. DeLaughter, 250 Ark. 990, 468 S.W.2d 242 (1971)—§§ 2005, 2006, 2007
- Arkansas State Highway Commission v. First Pyramid Life Ins. Co. of America, 269 Ark. 278, 602 S.W.2d 609 (1980)—§§ 2006, 2007, 2008
- Arkansas State Highway Commission v. First Pyramid Life Ins. Co. of America, 265 Ark. 417, 579 S.W.2d 587 (1979)—§ 106A
- Arkansas State Highway Commission v. Griffin, 241 Ark. 1033, 411 S.W.2d 495 (1967)—§ 2007
- Arkansas State Highway Commission v. Hambuchen, 243 Ark. 832, 422 S.W.2d 688 (1968)—§ 2001
- Arkansas State Highway Commission v. Hubach, 257 Ark. 117, 514 S.W.2d 386 (1974)—§ 2012
- Arkansas State Highway Commission v. Jones, 256 Ark. 40, 505 S.W.2d 210 (1974)—§§ 2002, 2003
- Arkansas State Highway Commission v. Liles, 256 Ark. 715, 510 S.W.2d 275 (1974)—§ 103
- Arkansas State Highway Commission v. Littlefield, 247 Ark. 686, 447 S.W.2d 146 (1969)—§ 2002
- Arkansas State Highway Commission v. Marshall, 253 Ark. 212, 485 S.W.2d 740 (1972)—§ 2006
- Arkansas State Highway Commission v. Pearrow, 1 Ark. App. 289, 614 S.W.2d 695 (1981)—§§ 2006, 2007
- Arkansas State Highway Commission v. Roberts, 246 Ark. 1216, 441 S.W.2d 808 (1969)—§ 2011
- Arkansas State Highway Commission v. Southern Development Corp., 250 Ark. 1016, 469 S.W.2d 102 (1971)—§ 2001
- Arkansas State Highway Commission v. Taylor, 269 Ark. 458, 602 S.W.2d 657 (1980)—§ 2009
- Arkansas State Highway Commission v. Witkowski, 236 Ark. 66, 364 S.W.2d 309 (1963)—§ 2011
- Arkansas State Highway Com'n v. Barker, 326 Ark. 403, 931 S.W.2d 138 (1996)—§§ 2002, 2003, 2011

ARKANSAS MODEL JURY INSTRUCTIONS-CIVIL

- Arkansas State Highway Com'n v. Frisby, 329 Ark. 506, 951 S.W.2d 305 (1997)—§§ 2002, 2003, 2009
- Arkansas State Highway Com'n v. Johnson, 300 Ark. 454, 780 S.W.2d 326 (1989)—§ 106A
- Arkansas State Highway Com'n v. Post, 330 Ark. 369, 955 S.W.2d 496 (1997)—§ 2008
- Arkansas Valley Elec. Co-op. Corp. v. Davis by Davis, 304 Ark. 70, 800 S.W.2d 420 (1990)—§§ 611, 1403
- Aronson v. Harriman, 321 Ark. 359, 901 S.W.2d 832 (1995)—§§ 1506, 1508, 1509
- Arrow Intern., Inc. v. Sparks, 81 Ark. App. 42, 98 S.W.3d 48 (2003)—§ 2218
- Arthur v. Zearley, 337 Ark. 125, 992 S.W.2d 67 (1999)—§§ 2204, 2206, 2207
- Auto Transports v. May, 224 Ark. 704, 275 S.W.2d 767 (1955)—§§ 2204, 2215
- Azzore Veterinary Specialists, LLC v. Hodgson, 2015 Ark. App. 158, 456 S.W.3d 795 (2015)—§ 2436

B

- Bailey v. Bradford, 244 Ark. 8, 423 S.W.2d 565 (1968)—§§ 2202, 2205
- Bailey v. Hammonds, 193 Ark. 633, 101 S.W.2d 785 (1937)—§ 2226A
- Bailey v. Rose Care Center, a Div. of C.A.R.E., Inc., 307 Ark. 14, 817 S.W.2d 412 (1991)—§ 1504
- Baker v. Arkansas Dept. of Human Services, 340 Ark. 42, 8 S.W.3d 499 (2000)—§§ 408, 2218, 2425
- Baker v. Armstrong, 271 Ark. 878, 611 S.W.2d 743 (1981)—§ 419
- Baker v. Pidgeon Thomas Co., 422 F.2d 744 (6th Cir. 1970)—§ 1203
- Balentine v. Sparkman, 327 Ark. 180, 937 S.W.2d 647 (1997)—§ 608
- Bank of America, N.A. v. C.D. Smith Motor Co., Inc., 353 Ark. 228, 106 S.W.3d 425, 50 U.C.C. Rep. Serv. 2d 670 (2003)—§§ 2442, 2443
- Bank of Cabot v. Bledsoe, 9 Ark. App. 145, 653 S.W.2d 144, 36 U.C.C. Rep. Serv. 1069 (1983)—§ 2427
- Bank of Cabot v. Ray, 279 Ark. 92, 648 S.W.2d 800 (1983)—§§ 2218, 2228
- Bankston v. McKenzie, 287 Ark. 350, 698 S.W.2d 799 (1985)—§§ 1206, 1207
- Baptist Health v. Murphy, 2010 Ark. 358, 373 S.W.3d 269 (2010)—§§ 403, 404, 2900
- Baptist Health v. Murphy, 365 Ark. 115, 226 S.W.3d 800 (2006)—§ 403
- Barham v. Standridge, 201 Ark. 1143, 148 S.W.2d 648 (1941)—§ 425
- Barnes v. Everett, 351 Ark. 479, 95 S.W.3d 740 (2003)—§§ 103, 1510, 1511
- Bartnicki v. Vopper, 532 U.S. 514, 121 S. Ct. 1753, 149 L. Ed. 2d 787 (2001)—§ 422
- Basic Inc. v. Levinson, 485 U.S. 224, 108 S. Ct. 978, 99 L. Ed. 2d 194, 24 Fed. R. Evid. Serv. 961, 10 Fed. R. Serv. 3d 308 (1988)—§ 2700
- Baskin v. Collins, 305 Ark. 137, 806 S.W.2d 3 (1991)—§ 402
- Bass v. Service Supply Co., Inc., 25 Ark. App. 273, 757 S.W.2d 189 (1988)—§ 2406
- Baucum v. Arkansas Power & Light Co., 179 Ark. 154, 15 S.W.2d 399 (1929)—§ 2004

TABLE OF CASES

- Baxter v. Grobmyer Bros. Const. Co., 275 Ark. 400, 631 S.W.2d 265 (1982)—§ 1104
- Bayer CropScience LP v. Schafer, 2011 Ark. 518, 385 S.W.3d 822 (2011)—§§ 2201, 2218
- Bayird v. Floyd, 2009 Ark. 455, 344 S.W.3d 80 (2009)—§ 701
- Beardsley v. Pennino, 19 Ark. App. 123, 717 S.W.2d 825 (1986)—§ 2442
- Beasley v. Boren, 210 Ark. 608, 197 S.W.2d 287 (1946)—§ 2407
- Beatty v. Haggard, 87 Ark. App. 75, 184 S.W.3d 479 (2004)—§ 402
- Beaumont v. Robinson, 282 Ark. 181, 668 S.W.2d 514 (1984)—§ 110
- Bedford v. Fox, 333 Ark. 509, 970 S.W.2d 251 (1998)—§ 2438
- Beevers v. Miller, 242 Ark. 541, 414 S.W.2d 603 (1967)—§ 502
- Beggs v. Stalnaker, 237 Ark. 281, 372 S.W.2d 600 (1963)—§ 2227
- Belford v. Humphrey, 244 Ark. 211, 424 S.W.2d 526 (1968)—§ 2202
- Belin v. West, 315 Ark. 61, 864 S.W.2d 838 (1993)—§ 2444
- Bell v. McManus, 294 Ark. 275—§ 2218
- Bell v. Pliva, Inc., 845 F. Supp. 2d 967 (E.D. Ark. 2012)—§ 1002
- Bell v. Radcliff, 32 Ark. 645, 1878 WL 1350 (1878)—§ 2304
- Bell v. Stafford, 284 Ark. 196, 680 S.W.2d 700 (1984)—§ 2204
- Belz-Burrows, L.P. v. Cameron Const. Co., 78 Ark. App. 84, 78 S.W.3d 126 (2002)—§§ 501, 502, 503
- Bene v. New York Life Ins. Co., 191 Ark. 714, 87 S.W.2d 979 (1935)—§ 2402
- Ben M. Hogan & Co. v. Fletcher, 236 Ark. 951, 370 S.W.2d 801 (1963)—§ 1203
- Ben M. Hogan & Co. v. Krug, 234 Ark. 280, 351 S.W.2d 451 (1961)—§ 501
- Benny M. Estes and Associates, Inc. v. Time Ins. Co., 980 F.2d 1228 (8th Cir. 1992)—§ 403
- Benson v. Shuler Drilling Co., Inc., 316 Ark. 101, 871 S.W.2d 552 (1994)—§ 302
- Benson v. Temple Inland Forest Products Corp., 328 Ark. 214, 942 S.W.2d 252 (1997)—§§ 502, 503
- Benton v. Merrill Lynch & Co., Inc., 524 F.3d 866 (8th Cir. 2008)—§ 2704
- Benton Gravel Co. v. Wright, 206 Ark. 930, 175 S.W.2d 208 (1943)—§§ 2223, 2224
- Berkeley Pump Co. v. Reed-Joseph Land Co., 279 Ark. 384, 653 S.W.2d 128, 37 U.C.C. Rep. Serv. 1107 (1983)—§§ 601, 1008, 1011, 1013, 1017, 2201, 2218
- Berry v. Chapple, 309 Ark. 612, 832 S.W.2d 256 (1992)—§ 901
- Bharodia v. Pledger, 340 Ark. 547, 11 S.W.3d 540 (2000)—§ 2436
- Bieker v. Owens, 234 Ark. 97, 350 S.W.2d 522 (1961)—§ 605
- Big A Warehouse Distributors, Inc. v. Rye Auto Supply, Inc., 19 Ark. App. 286, 719 S.W.2d 716 (1986)—§ 425
- Bill C. Harris Const. Co. Inc. v. Powers, 262 Ark. 96, 554 S.W.2d 332, 14 A.L.R.4th 812 (1977)—§§ 503, 701, 2230, 2442
- Bill Davis Trucking, Inc. v. Prysock, 301 Ark. 387, 784 S.W.2d 755 (1990)—§§ 2204, 2205, 2207, 2219
- Birchfield v. Nationwide Ins., 317 Ark. 38, 875 S.W.2d 502 (1994)—§ 2303

- Bisbee v. Decatur State Bank, 2010 Ark. App. 459, 376 S.W.3d 505 (2010)—§ 419
- Blagg v. Fred Hunt Co., Inc., 272 Ark. 185, 612 S.W.2d 321 (1981)—§§ 1205, 1206
- Blair v. U.S. for Use and Benefit of Gregory-Hogan, 150 F.2d 676 (C.C.A. 8th Cir. 1945)—§ 2401
- Blake v. Shellstrom, 2012 Ark. 428, 424 S.W.3d 830 (2012)—§ 2215
- Blankenship v. Burnett, 304 Ark. 469, 803 S.W.2d 539 (1991)—§ 203
- Blankenship v. Overholt, 301 Ark. 476, 786 S.W.2d 814 (1990)—§ 707
- Blissett v. Frisby, 249 Ark. 235, 458 S.W.2d 735 (1970)—§§ 2204, 2212, 2213
- Blythe v. Byrd, 251 Ark. 363, 472 S.W.2d 717 (1971)—§ 501
- BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996)—§§ 2218, 2218A
- Bockman v. Butler, 226 Ark. 159, 288 S.W.2d 597 (1956)—§ 2203
- Bockman v. Butler, 224 Ark. 125, 271 S.W.2d 918 (1954)—§ 2203
- Boellner v. Clinical Study Centers, LLC, 2011 Ark. 83, 378 S.W.3d 745 (2011)—§§ 411, 2206, 2443
- Bolstad v. Pergeson, 305 Ark. 163, 806 S.W.2d 377 (1991)—§ 1601
- Bomar v. Moser, 369 Ark. 123, 251 S.W.3d 234 (2007)—§ 1512
- Bona v. S.R. Thomas Auto Co., 137 Ark. 217, 208 S.W. 306 (1919)—§ 901
- Bond v. Missouri Pac. R. Co., 233 Ark. 32, 342 S.W.2d 473 (1961)—§ 1802
- Booth & Flynn v. Price, 183 Ark. 975, 39 S.W.2d 717, 76 A.L.R. 957 (1931)—§ 501
- Booth by Booth v. U.S. Industries, Inc., 583 F. Supp. 1561 (W.D. Ark. 1984)—§ 307A
- Boren v. Worthen Nat. Bank of Arkansas, 324 Ark. 416, 921 S.W.2d 934 (1996)—§ 1104
- Born v. Hosto & Buchan, PLLC, 2010 Ark. 292, 372 S.W.3d 324 (2010)—§§ 714, 2900
- Bowman v. McFarlin, 1 Ark. App. 235, 615 S.W.2d 383 (1981)—§ 2442
- Boyajian v. State, 2012 Ark. 210, 2012 WL 1739107 (2012)—§ 2900
- Boyd v. Reddick, 264 Ark. 671, 573 S.W.2d 634 (1978)—§ 503
- Boyd v. Mr. Tidy Car Wash, Inc., 294 Ark. 182, 741 S.W.2d 270 (1987)—§ 1106
- Bradley Lumber Co. v. Hamilton, 117 Ark. 127, 173 S.W. 848 (1915)—§ 425
- Bradshaw v. Alpha Packaging, Inc., 2010 Ark. App. 659, 379 S.W.3d 536 (2010)—§ 2602
- Brand v. Rorke, 225 Ark. 309, 280 S.W.2d 906 (1955)—§ 910
- Brandon v. Gazette Pub. Co., 234 Ark. 332, 352 S.W.2d 92 (1961)—§ 410
- Bridgforth v. Vandiver, 225 Ark. 702, 284 S.W.2d 623 (1955)—§§ 601, 903
- Briley v. White, 209 Ark. 941, 193 S.W.2d 326 (1946)—§ 2213
- Brinker v. Forrest City School Dist. No. 7, 344 Ark. 171, 40 S.W.3d 265 (2001)—§ 2303
- Bristow v. Mourrot, 99 Ark. App. 386, 260 S.W.3d 733 (2007)—§ 2704
- Britt Trucking Co. v. Ringgold, 209 Ark. 769, 192 S.W.2d 532 (1946)—§ 2207

TABLE OF CASES

- Brookside Village Mobile Homes v. Meyers, 301 Ark. 139, 782 S.W.2d 365 (1990)—§ 402
- Brown v. Chapman Farms, Inc., 289 Ark. 88, 709 S.W.2d 404 (1986)—§ 2218
- Brown v. Ruallam Enterprises, Inc., 73 Ark. App. 296, 44 S.W.3d 740 (2001)—§ 2604
- Browne v. Dugan, 189 Ark. 551, 74 S.W.2d 640 (1934)—§ 110
- Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 109 S. Ct. 2909, 106 L. Ed. 2d 219 (1989)—§ 2218
- Brumley v. Keech, 2012 Ark. 263, 2012 WL 2149767 (2012)—§ 2218
- Brumley v. Naples, 320 Ark. 310, 896 S.W.2d 860 (1995)—§ 1506
- Bruns v. Bruns, 290 Ark. 347, 719 S.W.2d 691 (1986)—§§ 2205, 2218
- Brunt v. Food 4 Less, Inc., 318 Ark. 427, 885 S.W.2d 894 (1994)—§ 1106
- Bryant v. Eifling, 301 Ark. 172, 782 S.W.2d 580 (1990)—§§ 210, 2101
- Bryant v. Putnam, 322 Ark. 284, 908 S.W.2d 338 (1995)—§ 1602
- Bryant v. Thomas, 230 Ark. 999, 328 S.W.2d 83 (1959)—§ 910
- Bryant, State ex rel. v. R & A Inv. Co., Inc., 336 Ark. 289, 985 S.W.2d 299 (1999)—§ 2900
- Buchanna v. Diehl Mach., Inc., 98 F.3d 366, 45 Fed. R. Evid. Serv. 288 (8th Cir. 1996)—§ 1015
- Buck v. Gillham, 80 Ark. App. 375, 96 S.W.3d 750 (2003)—§ 425
- Buckley v. Summerville, 2018 Ark. App. 100, 543 S.W.3d 534 (2018)—§ 2219
- Bullington v. Palangio, 345 Ark. 320, 45 S.W.3d 834 (2001)—§§ 1205, 1207
- Bull Motor Co. v. Murphy, 101 Ark. App. 33, 270 S.W.3d 350 (2007)—§ 2412
- Burbridge v. Bradley Lumber Co., 218 Ark. 897, 239 S.W.2d 285 (1951)—§ 2226A
- Burnett v. Seventh St. Produce Co., 185 Ark. 367, 47 S.W.2d 38 (1932)—§ 2214
- Burns v. Boot Scooters, Inc., 61 Ark. App. 124, 965 S.W.2d 798 (1998)—§ 503
- Burton v. General Motors Corp., 2008 WL 3853329 (S.D. Ind. 2008)—§ 2444
- Burton v. Ward, 218 Ark. 253, 236 S.W.2d 65 (1951)—§ 2001
- Bush v. Taylor, 130 Ark. 522, 197 S.W. 1172, 7 A.L.R. 262 (1917)—§ 2225
- Bushong v. Garman Co., 311 Ark. 228, 843 S.W.2d 807 (1992)—§ 1008
- Bussell v. Missouri Pac. R. Co., 237 Ark. 812, 376 S.W.2d 545 (1964)—§§ 601, 903
- Bussey v. Beardn, 2011 Ark. App. 353, 384 S.W.3d 41 (2011)—§ 1105
- Butler v. Hearst-Argyle Television, Inc., 345 Ark. 462, 49 S.W.3d 116 (2001)—§ 410
- Butler Mfg. Co. v. Hughes, 292 Ark. 198, 729 S.W.2d 142 (1987)—§ 2208
- Byford v. Gates Bros. Lumber Co., 216 Ark. 400, 225 S.W.2d 929 (1950)—§§ 2405, 2409
- Byrd v. Galbraith, 172 Ark. 219, 288 S.W. 717 (1926)—§§ 903, 2212, 2213

C

- Caddo Valley, City of v. George, 340 Ark. 203, 9 S.W.3d 481 (2000)—§ 913
- Callahan v. Clark, 321 Ark. 376, 901 S.W.2d 842 (1995)—§ 1510
- Callaway v. Cherry, 229 Ark. 297, 314 S.W.2d 506 (1958)—§ 706
- Calvary Christian School, Inc. v. Huffstuttlar, 367 Ark. 117, 238 S.W.3d 58, 227 Ed. Law Rep. 378 (2006)—§§ 401, 407
- Campbell v. Asbury Automotive, Inc., 2011 Ark. 157, 381 S.W.3d 21 (2011)—§ 2445
- Campbell v. Bastian, 236 Ark. 205, 365 S.W.2d 249 (1963)—§ 701
- Campbell v. Entergy Arkansas, Inc., 363 Ark. 132, 211 S.W.3d 500 (2005)—§ 307A
- Campbell Soup Co. v. Gates, 319 Ark. 54, 889 S.W.2d 750 (1994)—§§ 1007, 1008, 1016
- Cannady v. St. Vincent Infirmary Medical Center, 2018 Ark. 35, 537 S.W.3d 259 (2018)—§ 702
- Cannady v. St. Vincent Infirmary Medical Center, 2012 Ark. 369, 423 S.W.3d 548 (2012)—§§ 420, 421, 422, 423
- Cantlin v. Pavlovich, 265 Ark. 654, 580 S.W.2d 190 (1979)—§ 901
- Cantrell v. Toyota Motor Corp., 2018 Ark. App. 335, 553 S.W.3d 157 (2018)—§ 106
- Cantrell-Waind & Associates, Inc. v. Guillaume Motorsports, Inc., 62 Ark. App. 66, 968 S.W.2d 72 (1998)—§§ 2426, 2441
- Carder v. Burrow, 327 Ark. 545, 940 S.W.2d 429 (1997)—§ 2700
- Carmichael v. Little Rock Housing Authority, 227 Ark. 470, 299 S.W.2d 198 (1957)—§ 1109
- Carr v. Nance, 2010 Ark. 497, 370 S.W.3d 826 (2010)—§§ 1108, 2218
- Carr v. St. Paul Fire & Marine Ins. Co., 384 F. Supp. 821 (W.D. Ark. 1974)—§ 106
- Carroll-Boone Water Dist. v. M. & P. Equipment Co., 280 Ark. 560, 661 S.W.2d 345 (1983)—§§ 1108, 1204, 1301
- Carroll Elec. Co-op. Corp. v. Carlton, 319 Ark. 555, 892 S.W.2d 496 (1995)—§ 503
- Carter v. Cline, 2011 Ark. 474, 385 S.W.3d 745 (2011)—§ 2419
- Carter v. Four Seasons Funding Corp., 351 Ark. 637, 97 S.W.3d 387 (2003)—§§ 408, 2218, 2425
- Carter v. Quick, 263 Ark. 202, 563 S.W.2d 461 (1978)—§§ 1205, 1207
- Carton v. Missouri Pacific R. Co., 303 Ark. 568, 798 S.W.2d 674 (1990)—§§ 1104, 1107
- Car Transp. v. Garden Spot Distributors, 305 Ark. 82, 805 S.W.2d 632 (1991)—§ 425
- Cash v. Carter, 312 Ark. 41, 847 S.W.2d 18 (1993)—§ 701
- Castaneda v. Progressive Classic Ins. Co., 357 Ark. 345, 166 S.W.3d 556 (2004)—§ 2301
- Castrignano v. E.R. Squibb & Sons, Inc., 546 A.2d 775, 7 U.C.C. Rep. Serv. 2d 1423 (R.I. 1988)—§ 1009
- Caterpillar Tractor Co. v. Waterson, 13 Ark. App. 77, 679 S.W.2d 814, 40 U.C.C. Rep. Serv. 1721 (1984)—§ 2514
- Cates, 278 Ark. at—§ 2206

TABLE OF CASES

- Cates v. Brown, 278 Ark. 242, 645 S.W.2d 658 (1983)—§§ 2206, 2207
- Cathey v. Arkansas Power & Light Co., 193 Ark. 92, 97 S.W.2d 624 (1936)—§§ 210, 419
- Cato v. St. Louis Southwestern Ry. Co., 190 Ark. 231, 79 S.W.2d 62 (1935)—§§ 1102, 1103
- CBM of Central Arkansas v. Bemel, 274 Ark. 223, 623 S.W.2d 518 (1981)—§ 420
- Cecil v. Headley, 237 Ark. 400, 373 S.W.2d 136 (1963)—§ 2229
- Center v. Johnson, 295 Ark. 522, 750 S.W.2d 396 (1988)—§ 1203
- Central Flying Service v. Crigger, 215 Ark. 400, 221 S.W.2d 45 (1949)—§ 608
- Cesena v. Gray, 2009 Ark. App. 143, 316 S.W.3d 257 (2009)—§ 401
- Chalmers v. Toyota Motor Sales, USA, Inc., 326 Ark. 895, 935 S.W.2d 258 (1996)—§ 211
- Chamberlin v. State Farm Mut. Auto. Ins. Co., 343 Ark. 392, 36 S.W.3d 281 (2001)—§ 2303
- Chambliss v. Brinton, 229 Ark. 526, 317 S.W.2d 143 (1958)—§ 2216
- Chaney v. Duncan, 194 Ark. 1076, 110 S.W.2d 21 (1937)—§ 608
- Chapman Chemical Co. v. Taylor, for Use and Benefit of Wilson, 215 Ark. 630, 222 S.W.2d 820 (1949)—§§ 1001, 1004, 1108
- Chappell Chevrolet, Inc. v. Strickland, 4 Ark. App. 108, 628 S.W.2d 25, 33 U.C.C. Rep. Serv. 1327 (1982)—§ 2528
- Chatelain v. Kelley, 322 Ark. 517, 910 S.W.2d 215 (1995)—§ 2217
- Chavers v. General Motors Corp., 349 Ark. 550, 79 S.W.3d 361 (2002)—§ 501
- Cheatham v. Teva Pharmaceuticals USA, 726 F. Supp. 2d 1021 (E.D. Ark. 2010)—§ 1005
- Check v. Meredith, 243 Ark. 498, 420 S.W.2d 866 (1967)—§ 2206
- Checker Cab & Baggage Co. v. Harrison, 191 Ark. 564, 87 S.W.2d 32 (1935)—§ 1701
- Chicago, R. I. & P. R. Co. v. Gray, 248 Ark. 640, 453 S.W.2d 54 (1970)—§ 1805
- Chicago, R. I. & P. R. Co. v. Hughes, 250 Ark. 526, 467 S.W.2d 150 (1971)—§ 502
- Chicago, R. I. & P. R. Co. v. Mock, 252 Ark. 44, 477 S.W.2d 465 (1972)—§ 105
- Chicago, R.I. & P. Ry. Co. v. Britt, 189 Ark. 571, 74 S.W.2d 398 (1934)—§ 1503
- Chicago, R.I. & P. Ry. Co. v. Caple, 207 Ark. 52, 179 S.W.2d 151 (1944)—§ 2205
- Chicago, R.I. & P. Ry. Co. v. Houston, 209 Ark. 217, 189 S.W.2d 904 (1945)—§ 607
- Childs v. Adams, 322 Ark. 424, 909 S.W.2d 641, 58 A.L.R.5th 843 (1995)—§§ 2402, 2405
- Christy v. Pilkinton, 224 Ark. 407, 273 S.W.2d 533 (1954)—§ 2439
- Ciba-Geigy Corp. v. Alter, 309 Ark. 426, 834 S.W.2d 136, 20 U.C.C. Rep. Serv. 2d 448 (1992)—§§ 1012, 2407, 2508, 2514
- Cincinnati Life Ins. Co. v. Mickles, 85 Ark. App. 188, 148 S.W.3d 768 (2004)—§ 601

ARKANSAS MODEL JURY INSTRUCTIONS-CIVIL

- Cinnamon Valley Resort v. EMAC Enterprises, Inc., 89 Ark. App. 236, 202 S.W.3d 1 (2005)—§§ 1205, 2507
- Cisco v. King, 90 Ark. App. 307, 205 S.W.3d 808 (2005)—§ 3107
- Citizens Bank, Bentonville v. Chitty, 285 Ark. 55, 684 S.W.2d 814, 40 U.C.C. Rep. Serv. 989 (1985)—§ 3002
- City Nat. Bank of Fort Smith v. Goodwin, 301 Ark. 182, 783 S.W.2d 335, 11 U.C.C. Rep. Serv. 2d 605, 88 A.L.R.4th 631 (1990)—§§ 425, 503, 2218
- Clampit v. State Farm Mut. Auto. Ins. Co., 309 Ark. 107, 828 S.W.2d 593 (1992)—§ 2303
- Clark v. Duncan, 214 Ark. 83, 214 S.W.2d 493 (1948)—§ 2430
- Clark v. Ridgeway, 323 Ark. 378, 914 S.W.2d 745 (1996)—§ 1510
- Clark v. Transcontinental Ins. Co., 359 Ark. 340, 197 S.W.3d 449 (2004)—§§ 1204, 1401
- Clawson v. Rye, 281 Ark. 8, 661 S.W.2d 354 (1983)—§ 2203
- Coast to Coast Stores, Inc. v. Citizens Bank, 676 F. Supp. 923, 6 U.C.C. Rep. Serv. 2d 805 (E.D. Ark. 1987)—§ 3003
- Cobb v. Atkins, 239 Ark. 151, 388 S.W.2d 8 (1965)—§§ 201, 901
- Coca-Cola Bottling Co. v. Swilling, 186 Ark. 1149, 57 S.W.2d 1029 (1933)—§ 1007
- Coca Cola Bottling Co. of Blytheville v. Doud, 189 Ark. 986, 76 S.W.2d 87 (1934)—§ 901
- Coca-Cola Bottling Co. of Fort Smith, Ark. v. Hicks, 215 Ark. 803, 223 S.W.2d 762 (1949)—§ 609
- Coca-Cola Bottling Co. of Helena v. Mattice, 219 Ark. 428, 243 S.W.2d 15, 29 A.L.R.2d 1379 (1951)—§ 609
- Coca-Cola Bottling Co. of Memphis, Tennessee v. Priddy, 328 Ark. 666, 945 S.W.2d 355 (1997)—§ 2214
- Coca-Cola Bottling Co. of Southwest Arkansas v. Strather, 192 Ark. 999, 96 S.W.2d 14 (1936)—§ 109
- Cohen v. Ramey, 201 Ark. 713, 147 S.W.2d 338 (1941)—§ 902
- Cole v. Laws, 349 Ark. 177, 76 S.W.3d 878 (2002)—§ 1513
- Coleman v. Cathey, 263 Ark. 450, 565 S.W.2d 426 (1978)—§§ 2203, 2206
- Coleman v. United Fence Co., 282 Ark. 344, 668 S.W.2d 536 (1984)—§ 1102
- Collier v. Citizens Coach Co., 231 Ark. 489, 330 S.W.2d 74 (1959)—§ 501
- Collins v. Morgan, 92 Ark. App. 95, 211 S.W.3d 14 (2005)—§ 608
- Colonia Ins. Co. v. City Nat. Bank, 13 F. Supp. 2d 891 (W.D. Ark. 1998)—§ 2445
- Columbia Mut. Cas. Ins. Co. v. Ingraham, 47 Ark. App. 23, 883 S.W.2d 868 (1994)—§ 2425
- Columbia Nat. Ins. Co. v. Freeman, 347 Ark. 423, 64 S.W.3d 720 (2002)—§ 2304
- Com. Public Service Co. v. Lindsay, 139 Ark. 283, 214 S.W. 9 (1919)—§ 1405
- ConAgra Foods, Inc. v. Draper, 372 Ark. 361, 276 S.W.3d 244 (2008)—§ 209
- Conagra, Inc. v. Strother, 340 Ark. 672, 13 S.W.3d 150 (2000)—§ 1106
- ConAgra, Inc. v. Tyson Foods, Inc., 342 Ark. 672, 30 S.W.3d 725 (2000)—§ 2602

TABLE OF CASES

- Coney v. Stewart, 263 Ark. 148, 562 S.W.2d 619 (1978)—§ 1205
- Conley v. Fidelity-Phenix Fire Ins. Co. of N.Y., 102 F. Supp. 474 (W.D. Ark. 1952)—§ 2305
- Consent as Condition of Right to Perform Surgical Procedures, 139 A.L.R. 1370 (2014 Cum. Supp.)—§ 1506
- Continental Geophysical Co. v. Adair, 243 Ark. 589, 420 S.W.2d 836 (1967)—§ 1301
- Continental Ins. Companies v. Stanley, 263 Ark. 638, 569 S.W.2d 653 (1978)—§ 2438
- Continental Southern Lines, Inc. v. Goodsell, 247 Ark. 606, 446 S.W.2d 668 (1969)—§ 1702
- Continental Southern Lines, Inc. v. Moses, 239 Ark. 905, 395 S.W.2d 20 (1965)—§ 2203
- Conway Corp. v. Constr. Eng'rs, Inc., 300 Ark. 225, 782 S.W.2d 36 (1989)—§ 403
- Conway Corporation v. Construction Engineers, Inc., 300 Ark. 225, 782 S.W.2d 36 (1989)—§ 403
- Coombs v. Hot Springs Village Property Owners Ass'n, 98 Ark. App. 226, 254 S.W.3d 5 (2007)—§ 414
- Coombs v. J.B. Hunt Transport, Inc., 2012 Ark. App. 24, 388 S.W.3d 456 (2012)—§ 420
- Cooper v. Demby, 122 Ark. 266, 183 S.W. 185 (1916)—§ 417
- Cooper v. Diesel Service, Inc., 254 Ark. 743, 496 S.W.2d 383 (1973)—§ 1109
- Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001)—§ 2218
- Copeland v. Hollingsworth, 259 Ark. 603, 535 S.W.2d 815 (1976)—§ 708
- Cordes v. Outdoor Living Center, Inc., 301 Ark. 26, 781 S.W.2d 31 (1989)—§§ 413, 414
- Corn v. Farmers Ins. Co., 2013 Ark. 444, 430 S.W.3d 655 (2013)—§ 2303
- Cornett v. Prather, 293 Ark. 108, 737 S.W.2d 159 (1987)—§ 408
- Cotner v. International Harvester Co., 260 Ark. 885, 545 S.W.2d 627, 20 U.C.C. Rep. Serv. 1169 (1977)—§§ 1010, 2507
- Cottier v. City of Martin, 604 F.3d 553 (8th Cir. 2010)—§ 2218
- Country Corner Food and Drug, Inc. v. First State Bank and Trust Co. of Conway, Arkansas, 332 Ark. 645, 966 S.W.2d 894 (1998)—§§ 403, 2426
- Country Corner Food and Drug, Inc. v. Reiss, 22 Ark. App. 222, 737 S.W.2d 672 (1987)—§ 2444
- Courson v. Chandler, 258 Ark. 904, 529 S.W.2d 864 (1975)—§ 901
- Courtyard Gardens Health and Rehabilitation, LLC v. Arnold, 2018 Ark. 62, 485 S.W.3d 669 (2016)—§ 2439
- Cowan v. Ellison Enterprises, Inc., 93 Ark. App. 135, 217 S.W.3d 175 (2005)—§ 1106
- Cowart v. Casey Jones, Contractor, Inc., 250 Ark. 881, 467 S.W.2d 710 (1971)—§ 503
- Cox v. Bishop, 28 Ark. App. 210, 772 S.W.2d 358 (1989)—§§ 2428, 2442
- Cox v. Farrell, 292 Ark. 177, 728 S.W.2d 954 (1987)—§ 106A
- Cox v. McLaughlin, 315 Ark. 338, 867 S.W.2d 460 (1993)—§§ 2427, 2435

- Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975)—§ 422
- Craighead v. Missouri Pac. Transp. Co., 195 F.2d 652 (8th Cir. 1952)—§ 901
- Crain Industries, Inc. v. Cass, 305 Ark. 566, 810 S.W.2d 910 (1991)—§ 3107
- Cramer v. Arkansas Oklahoma Gas Corp., 316 Ark. 465, 872 S.W.2d 390 (1994)—§ 2004
- Crawford County v. Jones, 365 Ark. 585, 232 S.W.3d 433 (2006)—§§ 3101, 3102, 3107
- Crittenden County v. Davis, 2013 Ark. App. 655, 430 S.W.3d 172 (2013)—§ 2413
- Crockett & Brown, P.A. v. Courson, 312 Ark. 363, 849 S.W.2d 938 (1993)—§ 2427
- Croom v. Younts, 323 Ark. 95, 913 S.W.2d 283 (1996)—§ 2218
- Cross v. Arkansas Livestock and Poultry Com'n, 328 Ark. 255, 943 S.W.2d 230 (1997)—§ 403
- Cross v. State Farm Mutual Automobile Insurance Company, 2018 Ark. App. 98, 541 S.W.3d 495 (2018)—§ 2301
- Crouch v. Twin City Transit, Inc., 245 Ark. 778, 434 S.W.2d 816 (1968)—§ 701
- Crown Coach Co. v. Whitaker, 208 Ark. 535, 186 S.W.2d 940 (1945)—§ 1701
- CRT, Inc. v. Dunn, 248 Ark. 197, 451 S.W.2d 215 (1970)—§ 903
- Crumpacker v. Gary Reed Const., Inc., 2010 Ark. App. 179, 374 S.W.3d 162 (2010)—§§ 1205, 2401, 2442
- Cruthis, 360 Ark. at—§ 2445
- CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 113 S. Ct. 1732, 123 L. Ed. 2d 387 (1993)—§§ 1803, 1805
- Culpepper v. Smith, 302 Ark. 558, 792 S.W.2d 293 (1990)—§§ 413, 415
- Currier v. Spencer, 299 Ark. 182, 772 S.W.2d 309, 8 U.C.C. Rep. Serv. 2d 974 (1989)—§ 1012
- Curry v. Thornsberry, 354 Ark. 631, 128 S.W.3d 438 (2003)—§ 1205
- Curry v. Thornsberry, 81 Ark. App. 112, 98 S.W.3d 477 (2003)—§ 211
- Curtis v. Partain, 272 Ark. 400, 614 S.W.2d 671 (1981)—§ 2218

D

- DaimlerChrysler Corp. v. Smelser, 375 Ark. 216, 289 S.W.3d 466 (2008)—§ 2402
- Dalrymple v. Fields, 276 Ark. 185, 633 S.W.2d 362 (1982)—§§ 401, 2218
- Damascus, City of v. Bivens, 291 Ark. 600, 726 S.W.2d 677 (1987)—§ 2445
- D & S Coal Co., Inc. v. USX Corp., 678 F. Supp. 1318 (E.D. Tenn. 1988)—§ 2444
- Daniel v. Quick, 270 Ark. 528, 606 S.W.2d 81 (Ct. App. 1980)—§ 1205
- Daniel Const. Co. v. Holden, 266 Ark. 43, 585 S.W.2d 6 (1979)—§§ 1101, 1107
- Dardanelle, City of v. City of Russellville, 372 Ark. 486, 277 S.W.3d 562 (2008)—§ 2402
- Davis v. Davis, 313 Ark. 549, 856 S.W.2d 284 (1993)—§§ 501, 2206

TABLE OF CASES

- Davis v. Kemp, 252 Ark. 925, 481 S.W.2d 712 (1972)—§ 1501
- Davis v. Kukar, 235 Ark. 139, 357 S.W.2d 275 (1962)—§§ 702, 704
- Davis v. Richardson, 76 Ark. 348, 89 S.W. 318 (1905)—§ 417
- Davis v. Rodman, 147 Ark. 385, 227 S.W. 612, 13 A.L.R. 1459 (1921)—§ 1505
- Davis v. Safeway Stores, 195 Ark. 23, 110 S.W.2d 695 (1937)—§§ 1104, 1107
- Dawson v. Fulton, 294 Ark. 624, 745 S.W.2d 617 (1988)—§ 306
- Dawson v. Temps Plus, Inc., 337 Ark. 247, 987 S.W.2d 722 (1999)—§§ 2401, 2442
- Deck House, Inc. v. Link, 98 Ark. App. 17, 249 S.W.3d 817 (2007)—§§ 403, 2443
- DeGroft v. Lancaster Silo Co., Inc., 72 Md. App. 154, 527 A.2d 1316, 4 U.C.C. Rep. Serv. 2d 20 (1987)—§ 2501
- Deutsch v. Tillery, 309 Ark. 401, 833 S.W.2d 760, 76 Ed. Law Rep. 876 (1992)—§ 401
- Delanno, Inc. v. Peace, 366 Ark. 542, 237 S.W.3d 81 (2006)—§ 1512
- Delta Oxygen Co. v. Scott, 238 Ark. 534, 383 S.W.2d 885, 2 U.C.C. Rep. Serv. 388 (1964)—§ 609
- De Lukie v. American Petroleum Co., 170 Ark. 453, 280 S.W. 669 (1926)—§ 2427
- Dent v. Wright, 322 Ark. 256, 909 S.W.2d 302 (1995)—§ 2434
- DePriest v. AstraZeneca Pharmaceuticals, L.P., 2009 Ark. 547, 351 S.W.3d 168 (2009)—§ 2900
- Deutsche Bank Nat. Trust Co. v. Austin, 2011 Ark. App. 531, 385 S.W.3d 381 (2011)—§ 2445
- DeVazier v. Whit Davis Lumber Co., 257 Ark. 371, 516 S.W.2d 610 (1974)—§ 1104
- Dewitt v. Smith, 152 F.R.D. 162, 28 Fed. R. Serv. 3d 902 (W.D. Ark. 1993)—§ 307A
- Dews, 288 Ark. at—§ 2445
- Dews v. Halliburton, 288 Ark. at—§ 2445
- Dews v. Halliburton Industries, Inc., 288 Ark. 532, 708 S.W.2d 67 (1986)—§ 2445
- Dickens v. Farm Bureau Mut. Ins. Co. of Arkansas, 315 Ark. 514, 868 S.W.2d 476 (1994)—§ 707
- Dickerson Const. Co., Inc. v. Dozier, 266 Ark. 345, 584 S.W.2d 36 (1979)—§ 2226
- Dickson v. Delhi Seed Co., 26 Ark. App. 83, 760 S.W.2d 382, 8 U.C.C. Rep. Serv. 2d 925 (1988)—§ 2444
- Diemer v. Dischler, 313 Ark. 154, 852 S.W.2d 793 (1993)—§ 101
- Dildine v. Clark Equipment Co., 282 Ark. 130, 666 S.W.2d 692 (1984)—§ 1004
- Dillard Dept. Stores, Inc. v. Adams, 315 Ark. 303, 867 S.W.2d 442 (1993)—§ 201
- Dillard Dept. Stores, Inc. v. Felton, 276 Ark. 304, 634 S.W.2d 135 (1982)—§ 409
- Dilley v. Thomas, 106 Ark. 274, 153 S.W. 110 (1913)—§ 2401
- Dixon v. Ledbetter, 262 Ark. 758, 561 S.W.2d 294 (1978)—§ 1203

- Dixon Ticonderoga Co. v. Winburn Tile Mfg. Co., 324 Ark. 266, 920 S.W.2d 829 (1996)—§§ 107, 2218
- Dodrill, 265 Ark. at—§ 423
- Dodrill v. Arkansas Democrat Co., 265 Ark. 628, 590 S.W.2d 840 (1979)—§§ 407, 423
- Dodson v. Allstate Ins. Co., 345 Ark. 430, 47 S.W.3d 866 (2001)—§§ 713, 714
- Dodson v. Dicker, 306 Ark. 108, 812 S.W.2d 97 (1991)—§ 423
- Dollar General Corporation v. Elder, 2020 Ark. 208, 600 S.W.3d 597 (2020)—§ 1104
- Dollins v. Hartford Acc. & Indem. Co., 252 Ark. 13, 477 S.W.2d 179 (1972)—§ 609
- Donahue v. Cowdrey, 246 Ark. 1028, 440 S.W.2d 773 (1969)—§ 707A
- Donathan v. McDill, 304 Ark. 242, 800 S.W.2d 433 (1990)—§ 403
- Dongary Holstein Leasing, Inc. v. Covington, 293 Ark. 112, 732 S.W.2d 465 (1987)—§ 2218
- Dorton v. Francisco, 309 Ark. 472, 833 S.W.2d 362 (1992)—§ 1103
- Douglas Companies, Inc. v. Commercial Nat. Bank of Texarkana, 419 F.3d 812, 61 U.C.C. Rep. Serv. 2d 163 (8th Cir. 2005)—§ 3003
- Dovers v. Stephenson Oil Co., Inc., 354 Ark. 695, 128 S.W.3d 805 (2003)—§ 203
- Downen v. Redd, 367 Ark. 551, 242 S.W.3d 273 (2006)—§ 106
- Downey v. Duff, 106 Ark. 4, 152 S.W. 1010 (1912)—§ 417
- Downtowner Corp. v. Commonwealth Securities Corp., 243 Ark. 122, 419 S.W.2d 126 (1967)—§ 2404
- Dowty v. Riggs, 2010 Ark. 465, 385 S.W.3d 117 (2010)—§ 401
- Druckemiller v. Cluff, 316 Ark. 517, 873 S.W.2d 526 (1994)—§§ 206, 901
- Duckworth v. Stephens, 182 Ark. 161, 30 S.W.2d 840 (1930)—§ 2202
- Dugal Logging, Inc. v. Arkansas Pulpwood Co., 66 Ark. App. 22, 988 S.W.2d 25 (1999)—§§ 425, 2412
- Duke v. Lovell, 262 Ark. 290, 556 S.W.2d 416 (1977)—§ 104
- Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 105 S. Ct. 2939, 86 L. Ed. 2d 593 (1985)—§ 423
- Dunlap v. McCarty, 284 Ark. 5, 678 S.W.2d 361 (1984)—§§ 421, 422
- Dunn v. Brimer, 259 Ark. 855, 537 S.W.2d 164, 79 A.L.R.3d 958 (1976)—§ 601
- Durham v. Marberry, 356 Ark. 481, 156 S.W.3d 242 (2004)—§§ 2216, 2217
- DWB, LLC v. D & T Pure Trust, 2018 Ark. App. 283, 550 S.W.3d 420 (2018)—§§ 425, 2218
- Dye v. Burdick, 262 Ark. 124, 553 S.W.2d 833 (1977)—§ 1110

E

- Eady v. Lansford, 351 Ark. 249, 92 S.W.3d 57 (2002)—§§ 1501, 1508
- Earl by Earl v. Mosler Safe Co., 291 Ark. 276, 724 S.W.2d 174 (1987)—§ 2212
- East v. Woodruff, 209 Ark. 1046, 193 S.W.2d 664 (1946)—§ 904
- East Texas Motor Freight Lines, Inc. v. Freeman, 289 Ark. 539, 713 S.W.2d 456 (1986)—§§ 201, 901, 902, 2202

TABLE OF CASES

- Economy Swimming Pool Co. v. Freeling, 236 Ark. 888, 370 S.W.2d 438 (1963)—§ 2427
- E.I. Du Pont de Nemours and Co. v. Dillaha, 280 Ark. 477, 659 S.W.2d 756, 37 U.C.C. Rep. Serv. 705 (1983)—§§ 1008, 1011, 2507
- E.L. Bruce Co. v. Corbett, 188 Ark. 962, 69 S.W.2d 270 (1934)—§ 2214
- Electrocraft Arkansas, Inc. v. Super Electric Motors, Ltd., 70 U.C.C. Rep. Serv. 2d 716 (E.D. Ark. 2009)—§§ 2900, 2901
- Elk Corp. of Ark. v. Jackson, 291 Ark. 448, 725 S.W.2d 829 (1987)—§ 1008
- Elk Corp. of Arkansas v. Jackson, 291 Ark. 448, 725 S.W.2d 829 (1987)—§ 1016
- Elkins v. Arkla, Inc., 312 Ark. 280, 849 S.W.2d 489 (1993)—§ 707
- Ellis v. Liter, 311 Ark. 35, 841 S.W.2d 155 (1992)—§ 402
- Ellis v. Price, 337 Ark. 542, 990 S.W.2d 543 (1999)—§ 407
- Elrod v. Burlington Northern R. Co., 68 F.3d 241 (8th Cir. 1995)—§ 1805
- Elrod v. G & R Const. Co., 275 Ark. 151, 628 S.W.2d 17, 30 A.L.R.4th 831 (1982)—§§ 208, 608, 709A
- Emery Hughes Corp. v. Audrianna Grisham, P.A., 2011 Ark. 230, 2011 WL 2062325 (2011)—§ 2445
- Employers Ins. of Wausau v. Didion Mid-South Corp., 65 Ark. App. 201, 987 S.W.2d 745 (1999)—§ 1513
- Engelhardt v. Rogers Group, Inc., 132 F. Supp. 2d 757 (E.D. Ark. 2001)—§ 1008
- England v. Costa, 364 Ark. 116, 216 S.W.3d 585 (2005)—§§ 201, 602
- Engleman v. McCullough, 2017 Ark. App. 613, 535 S.W.3d 643 (2017)—§ 1501
- ERC Mortgage, 32 Ark. App.—§ 2405
- ERC Mortg. Group, Inc. v. Luper, 32 Ark. App. 19, 795 S.W.2d 362 (1990)—§§ 2402, 2405
- Erskine Williams Lumber Co. v. Burgess, 159 Ark. 431, 252 S.W. 353 (1923)—§ 2423
- Erwin v. Allied Van Lines, Inc., 240 Ark. 593, 401 S.W.2d 25 (1966)—§ 606
- Escobar v. A&A Orchard, LLC, 2021 Ark. App. 128, 620 S.W.3d 534 (2021)—§ 305
- Esry v. Carden, 328 Ark. 153, 942 S.W.2d 846 (1997)—§ 201
- Evans v. Hamby, 2011 Ark. 69, 378 S.W.3d 723 (2011)—§ 2438
- Excelsior Mining Co. v. Willson, 206 Ark. 1029, 178 S.W.2d 252 (1944)—§ 2423
- Exxon Shipping Co. v. Baker, 554 U.S. 471, 128 S. Ct. 2605, 171 L. Ed. 2d 570 (2008)—§ 2218

F

- Fairpark, LLC v. Healthcare Essentials, 2011 Ark. App. 146, 381 S.W.3d 852 (2011)—§ 2444
- Farm Bureau Ins. Co. v. Case Corp., 317 Ark. 467, 878 S.W.2d 741 (1994)—§ 1008
- Farm Bureau Mut. Ins. Co. of Arkansas v. Sells, 2010 Ark. App. 728, 379 S.W.3d 605 (2010)—§ 2412

ARKANSAS MODEL JURY INSTRUCTIONS-CIVIL

- Farm Bureau Mut. Ins. Co. of Arkansas, Inc. v. Henley, 275 Ark. 122, 628 S.W.2d 301 (1982)—§§ 801, 1102
- Farmer v. Riddle, 2011 Ark. App. 120, 2011 WL 548521 (2011)—§ 2445
- Farm Service Co-op., Inc. v. Goshen Farms, Inc., 267 Ark. 324, 590 S.W.2d 861 (1979)—§ 413
- Farris v. Tvedten, 274 Ark. 185, 623 S.W.2d 205 (1981)—§ 412
- Faulkner v. Arkansas Children's Hosp., 347 Ark. 941, 69 S.W.3d 393 (2002)—§§ 403, 3107
- Felton Oil Co., L.L.C. v. Gee, 357 Ark. 421, 182 S.W.3d 72 (2004)—§ 2224
- Ferguson v. Ben M. Hogan Co., 307 F. Supp. 658 (W.D. Ark. 1969)—§ 1203
- Fidelity Mortg. Co. of Texas v. Cook, 307 Ark. 496, 821 S.W.2d 39 (1991)—§ 402
- Fields v. Huff, 510 F. Supp. 238 (E.D. Ark. 1981)—§§ 2216, 2217, 2218
- Fields v. Sugar, 251 Ark. 1062, 476 S.W.2d 814 (1972)—§ 2512
- Findley v. Time Ins. Co., 64 Ark. 647, 573 S.W.2d 908 (1978)—§ 2304
- Finley v. Glover, 229 Ark. 368, 315 S.W.2d 928 (1958)—§ 1601
- Finley v. Smith, 240 Ark. 323, 399 S.W.2d 271 (1966)—§ 1602
- First Nat. Bank v. Godbey & Sons, 181 Ark. 1004, 29 S.W.2d 272 (1930)—§ 2438
- First Nat. Bank of Brinkley v. Frey, 282 Ark. 339, 668 S.W.2d 533, 38 U.C.C. Rep. Serv. 1312 (1984)—§ 425
- First Nat. Bank of Crossett v. Griffin, 310 Ark. 164, 832 S.W.2d 816 (1992)—§§ 2412, 2413
- First Nat. Bank of DeWitt v. Cruthis, 360 Ark. 528, 203 S.W.3d 88 (2005)—§ 2444
- First Pyramid Life Ins. Co. of America v. Stoltz, 311 Ark. 313, 312 Ark. 95, 843 S.W.2d 842 (1992)—§ 211
- First Sec. Bank of Searcy v. Doe, 297 Ark. 254, 760 S.W.2d 863 (1988)—§ 2301
- Fisher v. Jones, 311 Ark. 450, 844 S.W.2d 954 (1993)—§ 404
- Fite, 233 Ark. at—§ 2445
- Fite v. Fite, 233 Ark. 469, 345 S.W.2d 362 (1961)—§ 2445
- F.L. Davis Builders Supply, Inc. v. Knapp, 42 Ark. App. 52, 853 S.W.2d 288, 22 U.C.C. Rep. Serv. 2d 113 (1993)—§§ 2507, 2509, 2513, 2520
- Fletcher v. Price Chopper Foods of Trumann, Inc., 220 F.3d 871 (8th Cir. 2000)—§ 420
- Florida Star, The v. B.J.F., 491 U.S. 524, 109 S. Ct. 2603, 105 L. Ed. 2d 443 (1989)—§ 422
- FMC Corp., Inc. v. Helton, 360 Ark. 465, 202 S.W.3d 490 (2005)—§§ 401, 2218A
- Ford Motor Co. v. Fish, 233 Ark. 634, 346 S.W.2d 469 (1961)—§§ 108, 1001
- Ford Motor Co. v. Massey, 313 Ark. 345, 855 S.W.2d 897 (1993)—§ 107
- Ford Motor Credit Co., 267 Ark. at—§ 425
- Ford Motor Credit Co. v. Harper, 671 F.2d 1117, 33 U.C.C. Rep. Serv. 921 (8th Cir. 1982)—§ 2520
- Ford Motor Credit Co. v. Herring, 267 Ark. 201, 589 S.W.2d 584, 27 U.C.C. Rep. Serv. 1448 (1979)—§§ 425, 2218

TABLE OF CASES

- Fordyce v. McCants, 51 Ark. 509, 11 S.W. 694 (1889)—§ 2216
 Forever Green Athletic Fields, Inc. v. Lasiter Const., Inc., 2011 Ark. App. 347, 384 S.W.3d 540 (2011)—§ 413
 Forrest City Mach. Works, Inc. v. Aderhold, 273 Ark. 33, 616 S.W.2d 720 (1981)—§§ 1001, 1002, 1003, 1005, 2218
 Fort Smith Service Finance Corp. v. Parrish, 302 Ark. 299, 789 S.W.2d 723 (1990)—§ 2431
 Foster v. Pitts, 63 Ark. 387, 38 S.W. 1114 (1897)—§ 413
 Foundation Telecommunications, Inc. v. Moe Studio, Inc., 341 Ark. 231, 16 S.W.3d 531 (2000)—§ 2415
 Fountain v. Chicago, R.I. & P. Ry., 243 Ark. 947, 422 S.W.2d 878 (1968)—§§ 2216, 2217
 Franco v. Bunyard, 261 Ark. 144, 547 S.W.2d 91 (1977)—§ 601
 Fraser v. Hawkins, 137 Ark. 214, 208 S.W. 296 (1919)—§ 1601
 Freeman v. Anderson, 279 Ark. 282, 651 S.W.2d 450 (1983)—§ 2218
 Freeman v. Bechtel Const. Co., 87 F.3d 1029 (8th Cir. 1996)—§ 409
 Freeman v. Hoffman-La Roche, Inc., 260 Neb. 552, 618 N.W.2d 827, 42 U.C.C. Rep. Serv. 2d 952 (2000)—§ 1009
 Freeman v. Reeves, 241 Ark. 867, 410 S.W.2d 740 (1967)—§ 2206
 Friends of Children, 46 Ark. App.—§ 2445
 Friends of Children, Inc. v. Marcus, 46 Ark. App. 57, 876 S.W.2d 603 (1994)—§§ 2404, 2445
 Frigillana, 266 Ark. at—§ 2445
 Frigillana v. Frigillana, 266 Ark. 296, 584 S.W.2d 30 (1979)—§§ 2439, 2445
 Fritz v. Baptist Memorial Health Care Corp., 92 Ark. App. 181, 211 S.W.3d 593 (2005)—§§ 417, 419
 Fryar v. Sanders, 301 Ark. 379, 784 S.W.2d 168 (1990)—§ 2210
 Fryar v. Touchstone Physical Therapy, Inc., 365 Ark. 295, 229 S.W.3d 7 (2006)—§§ 601, 1501
 Fryer v. Boyett, 64 Ark. App. 7, 978 S.W.2d 304 (1998)—§§ 2412, 2419, 2420
 Ft. Smith, City of v. Findlay, 48 Ark. App. 197, 893 S.W.2d 358 (1995)—§ 2010
 Fuller v. Starnes, 268 Ark. 476, 597 S.W.2d 88 (1980)—§ 1508

G

- Gallup v. St. Louis, I.M. & S.R. Co., 140 Ark. 347, 215 S.W. 586 (1919)—§ 106
 Gambill v. Stroud, 258 Ark. 766, 531 S.W.2d 945, 91 A.L.R.3d 325 (1976)—§ 1501
 Garrison v. Funderburk, 262 Ark. 711, 561 S.W.2d 73 (1978)—§§ 803, 804
 Garrison v. St. Louis, I. M. & S. Ry. Co., 92 Ark. 437, 123 S.W. 657 (1909)—§ 304
 Gates v. Plummer, 173 Ark. 27, 291 S.W. 816 (1927)—§ 304
 General Fire Extinguisher Co. v. Beal-Doyle Dry Goods Co., 110 Ark. 49, 160 S.W. 889 (1913)—§ 2227
 George's, Inc. v. Otwell, 282 Ark. 152, 666 S.W.2d 406 (1984)—§ 707A

- Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974)—§ 407
- GGNSC Holdings, LLC v. Lamb By and Through Williams, 2016 Ark. 101, 487 S.W.3d 348 (2016)—§ 2439
- Gibson Appliance Co. v. Nationwide Ins. Co., 341 Ark. 536, 20 S.W.3d 285, 122 A.L.R.5th 773 (2000)—§ 107
- Giles v. Harrington, Miller, Neihouse & Krug, 362 Ark. 338, 208 S.W.3d 197 (2005)—§ 1510
- Gipson v. Garrison, 308 Ark. 344, 824 S.W.2d 829 (1992)—§ 2207
- Givens v. Hixson, 275 Ark. 370, 631 S.W.2d 263 (1982)—§ 401
- Gladden v. Arkansas Children's Hosp., 292 Ark. 130, 728 S.W.2d 501 (1987)—§ 3107
- Glasgow v. Century Property Fund XIX, 299 Ark. 221, 772 S.W.2d 312 (1989)—§§ 1104, 1105, 1107
- Glenn Mechanical, Inc. v. South Arkansas Regional Health Center, Inc., 101 Ark. App. 440, 278 S.W.3d 583 (2008)—§§ 2404, 2444, 2445
- Glover v. Dixon, 285 Ark. 140, 688 S.W.2d 930 (1985)—§§ 904, 905
- Goff v. Harold Ives Trucking Co., Inc., 342 Ark. 143, 27 S.W.3d 387 (2000)—§ 106
- Gott v. First Midwest Bank of Dexter, 963 S.W.2d 432 (Mo. Ct. App. S.D. 1998)—§ 714
- Graham Const. Co., Inc. v. Earl, 362 Ark. 220, 208 S.W.3d 106 (2005)—§ 1205
- Graves v. Bullock, 102 Ark. App. 197, 283 S.W.3d 615 (2008)—§ 2218
- Gray v. McLaughlin, 207 Ark. 191, 179 S.W.2d 686 (1944)—§ 1503
- Grayson v. Bank of Little Rock, 334 Ark. 180, 971 S.W.2d 788, 38 U.C.C. Rep. Serv. 2d 613 (1998)—§ 425
- Grayson-McLeod Lumber Co. v. Slack-Kress Tie & Stave Co., 102 Ark. 79, 143 S.W. 581 (1912)—§ 2436
- Great Atlantic & Pac. Tea Co. v. Gwilliams, 189 Ark. 1037, 76 S.W.2d 65 (1934)—§ 1007
- Great Dane Trailer Sales, Inc. v. Malvern Pulpwood, Inc., 301 Ark. 436, 785 S.W.2d 13, 11 U.C.C. Rep. Serv. 2d 875 (1990)—§§ 1011, 2507, 2513
- Green v. Equitable Powder Mfg. Co., 95 F. Supp. 127 (W.D. Ark. 1951)—§§ 1001, 1004, 1006
- Green v. Owens, 254 Ark. 574, 495 S.W.2d 166 (1973)—§ 2432
- Green v. West Memphis Lumber Co., 192 Ark. 1177, 91 S.W.2d 261 (1936)—§ 109
- Green v. Wilson, 194 Ark. 165, 105 S.W.2d 1074 (1937)—§ 1007
- Greene County v. Hicks, 249 Ark. 69, 458 S.W.2d 152 (1970)—§ 2002
- Greenfield Seed Co. v. Bland, 18 Ark. App. 48, 710 S.W.2d 833, 1 U.C.C. Rep. Serv. 2d 733 (1986)—§§ 1010, 2507
- Green Forest, City of v. Morse, 316 Ark. 540, 873 S.W.2d 155 (1994)—§ 401
- Greer v. White Oak State Bank, 673 S.W.2d 326, 39 U.C.C. Rep. Serv. 929 (Tex. App. Texarkana 1984)—§ 2445
- Growth Properties I v. Cannon, 282 Ark. 472, 669 S.W.2d 447 (1984)—§ 401

TABLE OF CASES

- GSS, LLC v. CenterPoint Energy Gas Transmission Co., 2014 Ark. 144, 432 S.W.3d 583 (2014)—§ 2011
- Guaranty Nat. Ins. Co. v. Denver Roller, Inc., 313 Ark. 128, 854 S.W.2d 312 (1993)—§ 2445
- Guerin Contractors, Inc. v. Reaves, 270 Ark. 710, 606 S.W.2d 143 (Ct. App. 1980)—§ 1203
- Gunn v. Farmers Ins. Exchange, 2010 Ark. 434, 372 S.W.3d 346 (2010)—§§ 2426, 2801
- Gurlen v. Henry Management, Inc., 2010 Ark. App. 855, 2010 WL 5132526 (2010)—§ 425
- Guthrie v. Tyson Foods, Inc., 285 Ark. 95, 685 S.W.2d 164 (1985)—§ 1107
- Guy Maris Trust v. Truemper, 2012 Ark. App. 232, 405 S.W.3d 427 (2012)—§ 425

H

- Haase v. Starnes, 323 Ark. 263, 915 S.W.2d 675 (1996)—§ 1501
- Hagan v. Knowles, 223 Ark. 590, 267 S.W.2d 514 (1954)—§ 902
- Hale v. Ladd, 308 Ark. 567, 826 S.W.2d 244 (1992)—§ 2218
- Hamby v. Haskins, 275 Ark. 385, 630 S.W.2d 37 (1982)—§ 2205
- Hammond Ranch Corp. v. Dodson, 199 Ark. 846, 136 S.W.2d 484 (1940)—§ 708
- Handy Dan Home Imp. Center, Inc.-Arkansas v. Peters, 286 Ark. 102, 689 S.W.2d 551 (1985)—§§ 1105, 2202, 2205
- Haney v. DeSandre, 286 Ark. 258, 692 S.W.2d 214 (1985)—§ 104
- Haney v. Noble, 250 Ark. 557, 466 S.W.2d 467 (1971)—§ 2204
- Hanna Lumber Co. v. Neff, 265 Ark. 462, 579 S.W.2d 95, 26 U.C.C. Rep. Serv. 708 (1979)—§ 2222
- Haralson v. Jones Truck Line, 223 Ark. 813, 270 S.W.2d 892, 48 A.L.R.2d 248 (1954)—§ 911
- Hardee's of Maumelle, Ark., Inc. v. Hardee's Food Systems, Inc., 31 F.3d 573 (7th Cir. 1994)—§ 2806
- Hardy v. Raines, 228 Ark. 648, 310 S.W.2d 494 (1958)—§ 2218
- Harkrider v. Cox, 230 Ark. 155, 321 S.W.2d 226 (1959)—§§ 601, 903
- Harlan v. Curbo, 250 Ark. 610, 466 S.W.2d 459 (1971)—§ 902
- Harmon v. Carco Carriage Corp., 320 Ark. 322, 895 S.W.2d 938 (1995)—§ 416
- Harold McLaughlin Reliable Truck Brokers, Inc. v. Cox, 324 Ark. 361, 922 S.W.2d 327 (1996)—§§ 413, 415, 2231
- Harper v. Missouri Pac. R. Co., 229 Ark. 348, 314 S.W.2d 696 (1958)—§ 1803
- Harrell Motors, Inc. v. Flanery, 272 Ark. 105, 612 S.W.2d 727 (1981)—§§ 1008, 1016
- Harrelson v. Whitehead, 236 Ark. 325, 365 S.W.2d 868 (1963)—§ 304
- Harris v. Holder, 217 Ark. 434, 230 S.W.2d 645 (1950)—§ 2441
- Harris v. Pacific Floor Mach. Mfg. Co., 856 F.2d 64, 26 Fed. R. Evid. Serv. 1067 (8th Cir. 1988)—§ 1017
- Harris v. Wildcat Corp., 97 Idaho 884, 556 P.2d 67 (1976)—§ 2431
- Harrison v. Benton State Bank, 6 Ark. App. 355, 642 S.W.2d 331 (1982)—§ 2431

- Hartford Ins. Co. of Midwest v. Mullinax, 336 Ark. 335, 984 S.W.2d 812 (1999)—§ 2303
- Hartsock v. Forsgren, Inc., 236 Ark. 167, 365 S.W.2d 117 (1963)—§ 501
- Harvey v. Shaver, 247 Ark. 92, 444 S.W.2d 256 (1969)—§ 605
- Hatchell v. Wren, 363 Ark. 107, 211 S.W.3d 516 (2005)—§ 2445
- Haynes v. American Motors Corp., 691 F.2d 1268, 11 Fed. R. Evid. Serv. 1471 (8th Cir. 1982)—§ 1015
- Hays v. Williams, 115 Ark. 406, 171 S.W. 882 (1914)—§ 202
- HCA Health Services of Midwest, Inc. v. National Bank of Commerce (of El Dorado), 294 Ark. 525, 745 S.W.2d 120, 2 A.L.R.5th 1030 (1988)—§ 2218
- Healey v. Cockrill, 133 Ark. 327, 202 S.W. 229 (1918)—§§ 702, 704
- Heigle v. Miller, 332 Ark. 315, 965 S.W.2d 116 (1998)—§ 1107
- Helton v. Missouri Pac. R. Co., 260 Ark. 342, 538 S.W.2d 569 (1976)—§ 712
- Henderson v. Universal Underwriters Ins. Co., 768 F. Supp. 688 (E.D. Ark. 1991)—§ 2303
- Henry v. Landreth, 254 Ark. 483, 494 S.W.2d 114 (1973)—§ 106A
- Hergeth, Inc. v. Green, 293 Ark. 119, 733 S.W.2d 409 (1987)—§ 1002
- Hess v. Treece, 286 Ark. 434, 693 S.W.2d 792 (1985)—§ 401
- Hettel v. Rye, 251 Ark. 868, 475 S.W.2d 536 (1972)—§§ 2301, 2303
- Hiatt v. Mazda Motor Corp., 75 F.3d 1252, 34 Fed. R. Serv. 3d 541 (8th Cir. 1996)—§ 307A
- Hice v. City of Fort Smith, 75 Ark. App. 410, 58 S.W.3d 870 (2001)—§ 3107
- Higgins, 287 Ark. at—§ 1008
- Higgins v. General Motors Corp., 287 Ark. 390, 699 S.W.2d 741 (1985)—§§ 1008, 1016
- Hill v. Galaxy Telecom, L.P., 176 F. Supp. 2d 636 (N.D. Miss. 2001)—§ 2426
- Hill v. Whitney, 213 Ark. 368, 210 S.W.2d 800 (1948)—§ 1202
- Hill v. Wilson, 216 Ark. 179, 224 S.W.2d 797 (1949)—§§ 302, 503
- Hill Const. Co. v. Bragg, 291 Ark. 382, 725 S.W.2d 538 (1987)—§§ 206, 1204
- Hines v. Johnson, 145 Ark. 592, 224 S.W. 989 (1920)—§ 2217
- Hinkle v. Perry, 296 Ark. 114, 752 S.W.2d 267 (1988)—§ 2204
- Hisaw v. State Farm Mut. Auto. Ins. Co., 353 Ark. 668, 122 S.W.3d 1 (2003)—§ 2303
- Hively v. Edwards, 278 Ark. 435, 646 S.W.2d 688 (1983)—§ 2303
- H.J. Heinz Co. v. Duke, 196 Ark. 180, 116 S.W.2d 1039 (1938)—§ 1007
- Hoffman v. Red Owl Stores, Inc., 26 Wisc. 2d—§ 2444
- Hogan v. Hill, 229 Ark. 758, 318 S.W.2d 580 (1958)—§§ 1202, 2207
- Hogg v. Jerry, 299 Ark. 283, 773 S.W.2d 84 (1989)—§ 2704
- Holcomb v. Gilbraith, 257 Ark. 32, 513 S.W.2d 796 (1974)—§ 604
- Holiday Inn Franchising, Inc. v. Hotel Associates, Inc., 2011 Ark. App. 147, 382 S.W.3d 6 (2011)—§ 402
- Holiday Inns, Inc. v. Drew, 276 Ark. 390, 635 S.W.2d 252 (1982)—§§ 206, 1107
- Hollomon v. Keadle, 326 Ark. 168, 931 S.W.2d 413 (1996)—§ 401

TABLE OF CASES

- Holmes v. Hollingsworth, 234 Ark. 347, 352 S.W.2d 96 (1961)—§ 2204
 Home Ins. Co. v. Covington, 255 Ark. 409, 501 S.W.2d 219 (1973)—
 § 1701
 Home Ins. Co. v. Harwell, 263 Ark. 884, 568 S.W.2d 17 (1978)—§§ 901,
 2301
 Home Ins. Co. v. Williams, 252 Ark. 1012, 482 S.W.2d 626 (1972)—
 § 2303
 Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415, 114 S. Ct. 2331, 129 L.
 Ed. 2d 336 (1994)—§ 2218
 Honeycutt v. Walden, 294 Ark. 440, 743 S.W.2d 809 (1988)—§ 2218
 Honeycutt, In re, 198 B.R. 306 (Bankr. E.D. Ark. 1996)—§§ 425, 2425
 Hopkins v. Chip-In-Saw, Inc., 630 F.2d 616, 30 Fed. R. Serv. 2d 592 (8th
 Cir. 1980)—§§ 1002, 1003
 Hortica-Florists' Mut. Ins. Co. v. Pittman Nursery Corp., 729 F.3d 846
 (8th Cir. 2013)—§ 2304
 Hosey v. Burgess, 319 Ark. 183, 890 S.W.2d 262 (1995)—§ 1513
 Hough v. Continental Leasing Corp., 275 Ark. 340, 630 S.W.2d 19
 (1982)—§ 201
 House v. Wal-Mart Stores, Inc., 316 Ark. 221, 872 S.W.2d 52 (1994)—
 § 1106
 Howard v. Dallas Morning News, Inc., 324 Ark. 91, 918 S.W.2d 178
 (1996)—§ 707
 Howard v. Northwest Arkansas Surgical Clinic, P.A., 324 Ark. 375, 921
 S.W.2d 596 (1996)—§ 211
 Howard's Laundry and Cleaners v. Brown, 266 Ark. 460, 585 S.W.2d
 944 (1979)—§ 2229
 Howell v. Scroll Technologies, 343 Ark. 297, 35 S.W.3d 800 (2001)—
 §§ 408, 2218, 2425
 Howell v. Worth James Const. Co., 259 Ark. 627, 535 S.W.2d 826
 (1976)—§ 2410
 Huffman v. Landers Ford North, Inc., 100 Ark. App. 159, 265 S.W.3d
 783 (2007)—§§ 425, 2218
 Hunt v. Riley, 322 Ark. 453, 909 S.W.2d 329 (1995)—§ 403
 Husted v. Richards, 245 Ark. 987, 436 S.W.2d 103 (1969)—§ 1107

I

- Ikani v. Bennett, 284 Ark. 409, 682 S.W.2d 747 (1985)—§ 409
 Independence County v. Pfizer, Inc., 534 F. Supp. 2d 882 (E.D. Ark.
 2008)—§ 2900
 Industrial Electronic Supply, Inc. v. Lytle Mfg., L.L.C., 94 Ark. App. 81,
 226 S.W.3d 1, 58 U.C.C. Rep. Serv. 2d 720 (2006)—§§ 1010, 2507
 Industrial Iron Works, Inc. v. Hodge, 2020 Ark. App. 56, 595 S.W.3d 9
 (2020)—§ 307
 Industrial Park Businessmen's Club, Inc. v. Buck, 252 Ark. 513, 479
 S.W.2d 842 (1972)—§ 1104
 Inge v. Walker, 70 Ark. App. 114, 15 S.W.3d 348 (2000)—§ 2431
 Ingersoll v. Mason, 254 F.2d 899 (8th Cir. 1958)—§ 705
 Ingersoll-Rand Co. v. El Dorado Chemical Co., 373 Ark. 226, 283 S.W.3d
 191 (2008)—§ 2420

Ingram v. Pirelli Cable Corp., 295 Ark. 154, 747 S.W.2d 103 (1988)—
§ 401
Integrated Direct Marketing, LLC v. May, 2016 Ark. 281, 495 S.W.3d 73
(2016)—§ 425
International Harvester Co. v. Land, 234 Ark. 682, 354 S.W.2d 13
(1962)—§ 1001
International Harvester Co. v. Pike, 249 Ark. 1026, 466 S.W.2d 901, 10
U.C.C. Rep. Serv. 1164 (1971)—§ 307A
Interstate Freeway Services, Inc. v. Houser, 310 Ark. 302, 835 S.W.2d
872 (1992)—§ 2218
Interstate Oil & Supply Co. v. Troutman Oil Co., 334 Ark. 1, 972 S.W.2d
941 (1998)—§§ 2206, 2443
Interurban Ry. Co. v. Trainer, 150 Ark. 19, 233 S.W. 816 (1921)—§ 2217
Ishie v. Kelley, 302 Ark. 112, 788 S.W.2d 225 (1990)—§ 2210

J

Jackson v. McCuiston, 247 Ark. 862, 448 S.W.2d 33 (1969)—§ 304
Jackson v. Petit Jean Elec. Co-op., 270 Ark. 506, 606 S.W.2d 66
(1980)—§ 708
Jackson v. Swift-Eckrich, 830 F. Supp. 486, 23 U.C.C. Rep. Serv. 2d 1118
(W.D. Ark. 1993)—§ 2514
Jackson v. U.S., 526 F. Supp. 1149 (E.D. Ark. 1981)—§§ 2205, 2208, 2209
James v. Bill C. Harris Const. Co., Inc., 297 Ark. 435, 763 S.W.2d 640
(1989)—§ 2218
Jarrett v. Matheney, 236 Ark. 892, 370 S.W.2d 440 (1963)—§§ 904, 909
J.E. Merit Constructors, Inc. v. Cooper, 345 Ark. 136, 44 S.W.3d 336
(2001)—§ 2220
Jenkins v. International Paper Co., 318 Ark. 663, 887 S.W.2d 300
(1994)—§§ 1104, 1106, 1107
Jennings Motors v. Burchfield, 182 Ark. 1047, 34 S.W.2d 455 (1931)—
§ 415
Jet Asphalt & Rock Co., Inc. v. Angelo Iafrate Const., LLC, 431 F.3d 613
(8th Cir. 2005)—§ 2436
Jewell v. General Air Conditioning Corp., 226 Ark. 304, 289 S.W.2d 881
(1956)—§ 2431
J.F. McGehee & Co. v. Fuller, 169 Ark. 920, 277 S.W. 39 (1925)—§ 3503
Jim Orr and Associates, Inc. v. Waters, 299 Ark. 526, 773 S.W.2d 99
(1989)—§§ 403, 2427
Jim Ray, Inc., 99 Ark. 315, 260 S.W.3d 307—§ 2218
Jim Ray, Inc. v. Williams, 99 Ark. 315, 260 S.W.3d 307 (2007)—§§ 2218,
2218A
John Deere Co. v. Broomfield, 803 F.2d 408, 2 U.C.C. Rep. Serv. 2d 948
(8th Cir. 1986)—§ 2406
Johnson v. American Cyanamid Co., 239 Kan. 279, 718 P.2d 1318, 66
A.L.R.4th 55 (1986)—§ 1009
Johnson v. Jones, 33 Ark. App. 149, 807 S.W.2d 39 (1991)—§ 2442
Johnson v. Newman, 168 Ark. 836, 271 S.W. 705 (1925)—§ 705
Johnson v. Rockwell Automation, Inc., 2009 Ark. 241, 308 S.W.3d 135
(2009)—§§ 203, 206, 307A, 501, 502, 2204

TABLE OF CASES

Johnson Timber Corp. v. Sturdivant, 295 Ark. 622, 752 S.W.2d 241 (1988)—§§ 612, 707, 912, 2303
 Johnston v. Curtis, 70 Ark. App. 195, 16 S.W.3d 283 (2000)—§ 2442
 Jolly v. Smith, 188 Ark. 446, 65 S.W.2d 908 (1933)—§§ 2212, 2213
 Jones v. Bourassa, 2011 Ark. App. 369, 383 S.W.3d 888 (2011)—§ 2445
 Jones v. Brown, 242 Ark. 537, 414 S.W.2d 618 (1967)—§ 106A
 Jones v. Central Arkansas Radiation Therapy Institute, Inc., 270 Ark. 988, 607 S.W.2d 334 (1980)—§ 211
 Jones v. Comer, 237 Ark. 500, 374 S.W.2d 465 (1964)—§ 1109
 Jones v. Commercial Printing Co., 249 Ark. 952, 463 S.W.2d 92 (1971)—§ 410
 Jones v. Davis, 300 Ark. 130, 777 S.W.2d 582—§ 804
 Jones v. Forrest City, 239 Ark. 211, 388 S.W.2d 386 (1965)—§ 606
 Jones v. Parrish, 330 Ark. 521, 954 S.W.2d 934 (1997)—§ 913
 Joshua v. McBride, 19 Ark. App. 31, 716 S.W.2d 215 (1986)—§ 2440
 Julian Martin, Inc. v. Indiana Refrigeration Lines, Inc., 262 Ark. 671, 560 S.W.2d 228 (1978)—§ 2444

K

Kanning v. Allstate Ins. Companies, 67 Ark. App. 135, 992 S.W.2d 831 (1999)—§§ 2303, 2412
 Kansas City Southern Ry. Co. v. Baker, 233 Ark. 610, 346 S.W.2d 215 (1961)—§ 1801
 Kansas City Southern Ry. Co. v. Winter, 217 Ark. 148, 228 S.W.2d 1001 (1950)—§ 3503
 Kaplon v. Howmedica, Inc., 83 F.3d 263 (8th Cir. 1996)—§§ 1008, 1016, 1017
 Kapp v. Bob Sullivan Chevrolet Co., 234 Ark. 395, 353 S.W.2d 5 (1962)—§ 1001
 KARK-TV v. Simon, 280 Ark. 228, 656 S.W.2d 702 (1983)—§ 410
 Kay v. Martin, 300 Ark. 193, 777 S.W.2d 859 (1989)—§ 2204
 K.C. Properties of N.W. Arkansas, Inc. v. Lowell Inv. Partners, LLC, 373 Ark. 14, 280 S.W.3d 1 (2008)—§§ 404, 2404, 2443, 2444, 2445
 Keller v. Safeco Ins. Co. of America, 317 Ark. 308, 877 S.W.2d 90 (1994)—§ 2412
 Kellerman v. Zeno, 64 Ark. App. 79, 983 S.W.2d 136 (1998)—§§ 301, 413, 414, 415
 Kelley v. USAA Cas. Ins. Co., 371 Ark. 344, 266 S.W.3d 734 (2007)—§ 2301
 Kelly v. Cessna, 282 Ark. 408, 668 S.W.2d 944 (1984)—§ 911
 Kelly v. Kelly, 264 Ark. 865, 575 S.W.2d 672 (1979)—§§ 408, 2218, 2425
 Kempner, 47 Ark. at—§ 2408
 Kempner v. Cohn, 47 Ark. 519, 1 S.W. 869 (1886)—§ 2408
 Kiemele v. Soo Line R. Co., 93 F.3d 472 (8th Cir. 1996)—§ 1805
 Kiersey v. Jeffrey, 369 Ark. 220, 253 S.W.3d 438 (2007)—§ 401
 Kimball v. Goldman, 117 Ark. 446, 174 S.W. 1185 (1915)—§ 2229
 Kincaid v. Taylor, 247 Ark. 205, 445 S.W.2d 67 (1969)—§ 702
 Kinco, Inc. v. Schueck Steel, Inc., 283 Ark. 72, 671 S.W.2d 178 (1984)—§ 403

ARKANSAS MODEL JURY INSTRUCTIONS-CIVIL

- King v. Cardin, 229 Ark. 929, 319 S.W.2d 214 (1959)—§ 2216
 King v. Powell, 85 Ark. App. 212, 148 S.W.3d 792 (2004)—§ 2226A
 Kirkendoll v. Hogan, 267 Ark. 1083, 593 S.W.2d 498 (Ct. App. 1980)—
 § 208
 Kistner v. Cupples, 2010 Ark. 416, 372 S.W.3d 339 (2010)—§ 707
 Knight v. Farmers' & Merchants' Gin Co., 159 Ark. 423, 252 S.W. 30
 (1923)—§ 1107
 Knoles v. Salazar, 298 Ark. 281, 766 S.W.2d 613 (1989)—§§ 2216, 2217
 Koch v. Northport Health Services of Arkansas, LLC, 361 Ark. 192, 205
 S.W.3d 754 (2005)—§ 601
 Kowalski v. Rose Drugs of Dardanelle, Inc., 2011 Ark. 44, 378 S.W.3d
 109 (2011)—§ 1501
 Kraft-Phenix Cheese Corp. v. Spelce, 195 Ark. 407, 113 S.W.2d 476
 (1938)—§ 1007
 Kremer v. Blissard Management & Realty, Inc., 289 Ark. 419, 711 S.W.2d
 813 (1986)—§ 2410
 Kroger Grocery & Baking Co. v. Melton, 193 Ark. 494, 102 S.W.2d 859
 (1937)—§ 1007
 Kroger Grocery & Baking Co. v. Reeves, 210 Ark. 178, 194 S.W.2d 876
 (1946)—§ 2218
 Kroger Grocery & Baking Co. v. Turner, 193 Ark. 227, 100 S.W.2d 82
 (1936)—§ 1007
 Kroger Grocery & Baking Co. v. Woods, 205 Ark. 131, 167 S.W.2d 869
 (1943)—§§ 104, 1007
 Kubik v. Igleheart, 280 Ark. 310, 657 S.W.2d 545 (1983)—§§ 501, 502
 Kudabeck v. Kroger Co., 338 F.3d 856, 61 Fed. R. Evid. Serv. 1433 (8th
 Cir. 2003)—§ 2203
 Kuykendall v. Newgent, 255 Ark. 945, 504 S.W.2d 344 (1974)—§§ 1104,
 1107
 Kyser v. Porter, 261 Ark. 351, 548 S.W.2d 128 (1977)—§§ 208, 608, 709A,
 912

L

- Lacy v. Flake & Kelley Management, Inc., 366 Ark. 365, 235 S.W.3d 894
 (2006)—§ 1105
 L. A. Green Seed Co. of Ark. v. Williams, 246 Ark. 463, 438 S.W.2d 717,
 6 U.C.C. Rep. Serv. 105 (1969)—§§ 1010, 2507
 Laird v. Lacey, 263 Ark. 570, 566 S.W.2d 145 (1978)—§ 2423
 Lake Village Implement Co. v. Cox, 252 Ark. 224, 478 S.W.2d 36, 10
 U.C.C. Rep. Serv. 1398 (1972)—§§ 2519, 2522
 Lambert v. Markley, 255 Ark. 851, 503 S.W.2d 162, 79 A.L.R.3d 337
 (1973)—§§ 603, 609, 610
 Lancaster v. Schilling Motors, Inc., 299 Ark. 365, 772 S.W.2d 349
 (1989)—§ 402
 Lane v. Chowning, 610 F.2d 1385 (8th Cir. 1979)—§ 714
 Langer v. Becker, 176 Ill. App. 3d 745, 126 Ill. Dec. 203, 531 N.E.2d 830
 (1st Dist. 1988)—§ 714
 Lanier v. Trammell, 207 Ark. 372, 180 S.W.2d 818 (1944)—§ 1501
 Larry Hobbs Farm Equipment, Inc. v. CNH America, LLC, 375 Ark.
 379, 291 S.W.3d 190 (2009)—§ 2802

TABLE OF CASES

- Larson Mach., Inc. v. Wallace, 268 Ark. 192, 600 S.W.2d 1 (1980)—
§§ 503, 1002
- Lavaca School Dist. No. 3 v. Charleston School Dist. No. 9, 304 Ark.
104, 800 S.W.2d 703, 64 Ed. Law Rep. 1272 (1990)—§ 2438
- Lawson v. Stephens, 241 Ark. 407, 407 S.W.2d 917 (1966)—§§ 905, 2219
- LeClaire v. Commercial Siding and Maintenance Co., 308 Ark. 580, 826
S.W.2d 247 (1992)—§ 608
- Lee v. Martin, 74 Ark. App. 193, 45 S.W.3d 860 (2001)—§ 1008
- Lemon v. Laws, 313 Ark. 11, 852 S.W.2d 127 (1993)—§ 1510
- Leonard v. Downing, 246 Ark. 397, 438 S.W.2d 327 (1969)—§§ 2425,
2430
- Leonard v. Merchants and Farmers Bank, 290 Ark. 571, 720 S.W.2d 908
(1986)—§ 2422
- Les-Bil, Inc. v. General Waterworks Corp., 256 Ark. 905, 511 S.W.2d 166
(1974)—§§ 2414, 2424
- Lewis v. Mobil Oil Corp., 438 F.2d 500, 8 U.C.C. Rep. Serv. 625 (8th Cir.
1971)—§ 2522
- Lewis v. Roescher, 193 Ark. 161, 98 S.W.2d 956 (1936)—§ 1007
- Lewis v. Rowland, 287 Ark. 474, 701 S.W.2d 122 (1985)—§ 2211
- L.F. Brands Marketing, Inc. v. Dillard's, Inc., 2009 Ark. App. 174, 314
S.W.3d 736, 68 U.C.C. Rep. Serv. 2d 178 (2009)—§ 2511
- Life & Cas. Ins. Co. of Tenn. v. Padgett, 241 Ark. 353, 407 S.W.2d 728
(1966)—§§ 702, 2218
- Lilly v. J. A. Riggs Tractor Co., 238 Ark. 1027, 386 S.W.2d 488 (1965)—
§ 1005
- Linxwiler v. El Dorado Sports Center, Inc., 233 Ark. 191, 343 S.W.2d
411 (1961)—§ 1107
- Little v. McGraw, 250 Ark. 766, 467 S.W.2d 163 (1971)—§§ 708, 709
- Little Rock, City of v. Weber, 298 Ark. 382, 767 S.W.2d 529 (1989)—
§ 913
- Little Rock & F.S.R. Co. v. Finley, 37 Ark. 562, 1881 WL 1537 (1881)—
§ 1601
- Little Rock Elec. Contractors, Inc. v. Okonite Co., 294 Ark. 399, 744
S.W.2d 381, 5 U.C.C. Rep. Serv. 2d 978 (1988)—§ 1014
- Little Rock Gas & Fuel Co. v. Coppedge, 116 Ark. 334, 172 S.W. 885
(1915)—§ 2211
- Little Rock Newspapers, Inc. v. Dodrill, 281 Ark. 25, 660 S.W.2d 933
(1983)—§ 407
- Little Rock Newspapers, Inc. v. Fitzhugh, 330 Ark. 561, 954 S.W.2d 914
(1997)—§ 408
- Little Rock Wastewater Utility v. Larry Moyer Trucking, Inc., 321 Ark.
303, 902 S.W.2d 760 (1995)—§ 2410
- Lively v. Libbey Memorial Physical Medicine Center, Inc., 311 Ark. 41,
841 S.W.2d 609 (1992)—§§ 1101, 1103, 1104, 1107
- Lloyd v. Pier West Property Owners Association, 2015 Ark. App. 487,
470 S.W.3d 293 (2015)—§ 1105
- Lockhart v. O'Hara, 380 F. Supp. 379 (W.D. Ark. 1974)—§ 2203
- Lockhart v. Ross, 191 Ark. 743, 87 S.W.2d 73 (1935)—§§ 712, 901
- Long v. Lampton, 324 Ark. 511, 922 S.W.2d 692 (1996)—§§ 1512, 1513

Lopez v. Mendez, 432 F.3d 829 (8th Cir. 2005)—§§ 1202, 1203
 Lou v. Smith, 285 Ark. 249, 685 S.W.2d 809 (1985)—§ 2218
 Louisiana & A. Ry. Co. v. Muldrow, 181 Ark. 674, 27 S.W.2d 516
 (1930)—§ 202
 Louisiana and North West R.R. Co. v. Willis, 289 Ark. 410, 711 S.W.2d
 805 (1986)—§ 1801
 Loveless v. Diehl, 235 Ark. 805, 236 Ark. 129, 364 S.W.2d 317 (1962)—
 § 2429
 Lovell v. Brock, 330 Ark. 206, 952 S.W.2d 161 (1997)—§ 712
 Lowden v. Quimby, 192 Ark. 307, 90 S.W.2d 984 (1936)—§ 912
 Ludwig v. Bella Casa, LLC, 2010 Ark. 435, 372 S.W.3d 792 (2010)—
 § 2444
 Lupo v. Lineberger, 313 Ark. 315, 855 S.W.2d 293 (1993)—§ 2218
 Lynch v. Stephens, 179 Ark. 118, 14 S.W.2d 257 (1929)—§ 2442
 Lynn v. Wal-Mart Stores, Inc., 102 Ark. App. 65, 280 S.W.3d 574
 (2008)—§ 3107

M

Madden v. Aldrich, 346 Ark. 405, 58 S.W.3d 342 (2001)—§§ 709A, 1510
 Madison-Smith Cadillac Co. v. Lloyd, 184 Ark. 542, 43 S.W.2d 729
 (1931)—§ 902
 Magic Touch Corp. v. Hicks, 99 Ark. App. 334, 260 S.W.3d 322 (2007)—
 §§ 2412, 3107
 Mahan v. Hall, 320 Ark. 473, 897 S.W.2d 571, 68 A.L.R.5th 813
 (1995)—§ 603
 Malvern Brick & Tile Co. v. Hill, 232 Ark. 1000, 342 S.W.2d 305
 (1961)—§ 413
 Mangrum v. Pigue, 359 Ark. 373, 198 S.W.3d 496 (2004)—§ 1108
 Marine Mart, Inc. v. Pearce, 252 Ark. 601, 480 S.W.2d 133, 10 U.C.C.
 Rep. Serv. 1047 (1972)—§ 2517
 Marks v. Powell, 162 B.R. 820, 24 U.C.C. Rep. Serv. 2d 371 (E.D. Ark.
 1993)—§ 2805
 Martin v. Arthur, 339 Ark. 149, 3 S.W.3d 684 (1999)—§ 211
 Martin v. Vaught, 128 Ark. 293, 194 S.W. 10 (1917)—§ 202
 Marx v. Huron Little Rock, 88 Ark. App. 284, 198 S.W.3d 127 (2004)—
 §§ 609, 610
 Marx Real Estate Investments, LLC v. Coloso, 2011 Ark. App. 426, 384
 S.W.3d 595 (2011)—§ 4028
 Mary Kay, Inc. v. Isbell, 338 Ark. 556, 999 S.W.2d 669 (1999)—§ 2801
 Mason v. Funderburk, 247 Ark. 521, 446 S.W.2d 543 (1969)—§§ 403, 713,
 714
 Mason v. Jackson, 323 Ark. 252, 914 S.W.2d 728, 28 U.C.C. Rep. Serv.
 2d 1098 (1996)—§ 2501
 Mason v. Mitcham, 2011 Ark. App. 189, 382 S.W.3d 717 (2011)—§ 1008
 Mason v. Wal-Mart Stores, Inc., 333 Ark. 3, 969 S.W.2d 160 (1998)—
 §§ 403, 404
 Massachusetts Mut. Life Ins. Co. v. Peoples Loan & Inv. Co., 191 Ark.
 982, 88 S.W.2d 831 (1935)—§ 2431
 Masterson v. Stambuck, 321 Ark. 391, 902 S.W.2d 803 (1995)—§§ 1501,
 1504

TABLE OF CASES.

- Matthews v. Rodgers, 279 Ark. 328, 651 S.W.2d 453 (1983)—§§ 2208, 2218
- M. B. M. Co., Inc. v. Counce, 268 Ark. 269, 596 S.W.2d 681 (1980)—§ 401
- McChristian v. Hooten, 245 Ark. 1045, 436 S.W.2d 844 (1969)—§§ 201, 3501
- McClard v. Crain Management Group, Inc., 313 Ark. 472, 855 S.W.2d 929 (1993)—§ 402
- McCorkle Farms, Inc. v. Thompson, 79 Ark. App. 150, 84 S.W.3d 884 (2002)—§ 708
- McCormick v. Sexton, 239 Ark. 29, 386 S.W.2d 930 (1965)—§ 2216
- McCourt Mfg. Corp. v. Rycroft, 2009 Ark. 332, 322 S.W.3d 491 (2009)—§ 2437
- McCoy v. Augusta Fiberglass Coatings, Inc., 593 F.3d 737 (8th Cir. 2010)—§§ 203, 206, 501, 502
- McCoy v. Crumby, 353 Ark. 251, 106 S.W.3d 462 (2003)—§ 2217
- McDaniel v. Linder, 66 Ark. App. 362, 990 S.W.2d 593 (1999)—§ 2227
- McDaniel Bros. Const. Co. v. Mid-State Const. Co., 252 Ark. 1223, 482 S.W.2d 825 (1972)—§ 103
- McDonald v. Pettus, 337 Ark. 265, 988 S.W.2d 9 (1999)—§ 1510
- McGeorge Contracting Co. v. Mizell, 216 Ark. 509, 226 S.W.2d 566 (1950)—§§ 1201, 1202
- McGraw v. Weeks, 326 Ark. 285, 930 S.W.2d 365 (1996)—§§ 701, 2226
- McIlroy Bank & Trust v. Seven Day Builders of Arkansas, Inc., 1 Ark. App. 121, 613 S.W.2d 837, 33 U.C.C. Rep. Serv. 1824 (1981)—§ 425
- McIlroy Bank & Trust Co. v. Comstock, 13 Ark. App. 13, 678 S.W.2d 782 (1984)—§ 2406
- McKenzie v. Tom Gibson Ford, Inc., 295 Ark. 326, 749 S.W.2d 653 (1988)—§ 425
- McMahan v. Berry, 319 Ark. 88, 890 S.W.2d 242 (1994)—§§ 701, 705, 706
- McMaster v. McIlroy Bank, 9 Ark. App. 124, 654 S.W.2d 591 (1983)—§ 2442
- McMickle v. Griffin, 369 Ark. 318, 254 S.W.3d 729 (2007)—§§ 601, 903
- McMillan v. Meuser Material & Equipment Co., Inc., 260 Ark. 422, 541 S.W.2d 911, 20 U.C.C. Rep. Serv. 110 (1976)—§ 2526
- McMillin v. Bearden, 237 Ark. 673, 376 S.W.2d 665 (1964)—§§ 903, 1202
- McMullen v. Healthcare Staffing Associates, Inc., 2012 Ark. App. 617, 424 S.W.3d 404 (2012)—§ 707A
- McQuay v. Guntharp, 331 Ark. 466, 963 S.W.2d 583 (1998)—§ 401
- McQuillan v. Mercedes-Benz Credit Corp., 331 Ark. 242, 961 S.W.2d 729, 36 U.C.C. Rep. Serv. 2d 844 (1998)—§ 425
- MDH Builders, Inc. v. Nabholz Const. Corp., 70 Ark. App. 284, 17 S.W.3d 97 (2000)—§§ 2405, 2409
- Medical Assur. Co., Inc. v. Castro, 2009 Ark. 93, 302 S.W.3d 592 (2009)—§ 201
- Medi-Stat, Inc. v. Kusturin, 303 Ark. 45, 792 S.W.2d 869 (1990)—§§ 701, 707
- Medi-Stat, Inc. v. Kusturin, 303 Ark. 45, 792 S.W.2d 869—§ 1503
- Medlock v. Burden, 321 Ark. 269, 900 S.W.2d 552 (1995)—§ 711

ARKANSAS MODEL JURY INSTRUCTIONS-CIVIL

- Megee v. Reed, 252 Ark. 1016, 482 S.W.2d 832 (1972)—§ 609
- Members Mut. Ins. Co. v. Blissett, 254 Ark. 211, 492 S.W.2d 429 (1973)—§ 2304
- Mendoza v. WIS International, Inc., 2016 Ark. 157, 490 S.W.3d 298 (2016)—§§ 601, 903
- Menser v. Danner, 219 Ark. 130, 240 S.W.2d 652 (1951)—§§ 904, 909
- Mercantile Bank of Arkansas v. Vowell, 82 Ark. App. 421, 117 S.W.3d 603, 50 U.C.C. Rep. Serv. 2d 631 (2003)—§§ 3003, 3006
- Merchants & Planters Bank & Trust Co. of Arkadelphia v. Massey, 302 Ark. 421, 790 S.W.2d 889 (1990)—§ 2445
- Mercy Health System of Northwest Arkansas v. McGraw, 2013 Ark. App. 459, 429 S.W.3d 298 (2013)—§ 2444
- Mercy Health System of Northwest Arkansas, Inc. v. Bicak, 2011 Ark. App. 341, 383 S.W.3d 869 (2011)—§ 403
- Merex A.G. v. Fairchild Weston Systems, Inc., 29 F.3d 821, 29 Fed. R. Serv. 3d 560 (2d Cir. 1994)—§ 2444
- Mertyris v. P.A.M. Transport, Inc., 310 Ark. 132, 832 S.W.2d 823 (1992)—§ 3107
- MFA Mut. Ins. Co. v. Bradshaw, 245 Ark. 95, 431 S.W.2d 252 (1968)—§ 2303
- Microsize, Inc. v. Arkansas Microfilm, Inc., 29 Ark. App. 49, 780 S.W.2d 574, 11 U.C.C. Rep. Serv. 2d 837 (1989)—§ 2520
- Middleton v. Middleton, 188 Ark. 1022, 68 S.W.2d 1003 (1934)—§ 106
- Mid-South Beverages, Inc. v. Forrest City Grocery Co., Inc., 300 Ark. 204, 778 S.W.2d 218 (1989)—§ 403
- Midwest Buslines, Inc. v. Johnson, 291 Ark. 304, 724 S.W.2d 453 (1987)—§ 2205
- Milam v. Midland Corp., 282 Ark. 15, 665 S.W.2d 284 (1984)—§ 1008
- Miller v. Blanton, 213 Ark. 246, 210 S.W.2d 293, 3 A.L.R.2d 203 (1948)—§ 2218
- Miller v. F. W. Woolworth Co., 238 Ark. 709, 384 S.W.2d 947 (1964)—§ 1106
- Miller v. Willey, 257 Ark. 961, 521 S.W.2d 68 (1975)—§ 2429
- Miller Brewing Co. v. Ed Roleson, Jr., Inc., 365 Ark. 38, 223 S.W.3d 806 (2006)—§ 2805
- Mills v. Crone, 63 Ark. App. 45, 973 S.W.2d 828 (1998)—§ 608
- Millsap v. Williams, 2014 Ark. 469, 449 S.W.3d 291 (2014)—§§ 1508, 1509
- Minerva Enterprises, Inc. v. Bituminous Cas. Corp., 312 Ark. 128, 851 S.W.2d 403 (1993)—§ 2412
- Minerva Enterprises Inc. v. Howlett, 308 Ark. 291, 824 S.W.2d 377 (1992)—§§ 2221, 2227, 2228, 2229
- Minor v. Chase Auto Finance Corp., 2010 Ark. 246, 372 S.W.3d 762, 72 U.C.C. Rep. Serv. 2d 610 (2010)—§ 2511
- Minor v. Failla, 329 Ark. 274, 946 S.W.2d 954 (1997)—§ 409
- Missouri Pacific R. Co. v. Arkansas Sheriff's Boys' Ranch, 280 Ark. 53, 655 S.W.2d 389 (1983)—§ 2218
- Missouri Pacific R. Co. v. Biddle, 293 Ark. 142, 732 S.W.2d 473 (1987)—§ 1805

TABLE OF CASES

- Missouri Pac. R. Co. v. Benham, 192 Ark. 35, 89 S.W.2d 928 (1936)—
§ 2226
- Missouri Pac. R. Co. v. Binkley, 208 Ark. 933, 188 S.W.2d 291 (1945)—
§ 1804
- Missouri Pac. R. Co. v. Carruthers, 204 Ark. 419, 162 S.W.2d 912
(1942)—§ 1801
- Missouri Pac. R. Co. v. Creekmore, 193 Ark. 722, 102 S.W.2d 553
(1937)—§ 2216
- Missouri Pac. R. Co. v. Dennis, 205 Ark. 28, 166 S.W.2d 886 (1942)—
§ 1801
- Missouri Pac. R. Co. v. Edwards, 178 Ark. 732, 14 S.W.2d 230 (1928)—
§ 1802
- Missouri Pac. R. Co. v. Ellison, 250 Ark. 160, 465 S.W.2d 85 (1971)—
§ 1802
- Missouri Pac. R. Co. v. Fikes, 211 Ark. 256, 200 S.W.2d 97 (1947)—
§ 1802
- Missouri Pac. R. Co. v. Gilbert, 206 Ark. 683, 178 S.W.2d 73 (1944)—
§ 2216
- Missouri Pac. R. Co. v. Greene, 177 Ark. 217, 6 S.W.2d 26 (1928)—
§ 1802
- Missouri Pac. R. Co. v. Howard, 204 Ark. 253, 161 S.W.2d 759 (1942)—
§ 1801
- Missouri Pac. R. Co. v. King, 200 Ark. 1066, 143 S.W.2d 55 (1940)—
§ 1804
- Missouri Pac. R. Co. v. Maxwell, 194 Ark. 938, 109 S.W.2d 1254
(1937)—§ 2217
- Missouri Pac. R. Co. v. McDaniel, 252 Ark. 586, 483 S.W.2d 569
(1972)—§ 2205
- Missouri Pac. R. Co. v. McKinney, 189 Ark. 69, 71 S.W.2d 180 (1934)—
§ 2217
- Missouri Pac. R. Co. v. Thomas, 197 Ark. 565, 124 S.W.2d 820 (1939)—
§ 1103
- Missouri Pac. R. Co. v. Winburn Tile Mfg. Co., 461 F.2d 984 (8th Cir.
1972)—§ 2421
- Missouri Pac. R. Co. v. Wood, 165 Ark. 240, 263 S.W. 964 (1924)—§ 2225
- Missouri Pac. Transp. Co. v. Miller, 227 Ark. 351, 299 S.W.2d 41
(1957)—§§ 901, 2211
- Missouri Pac. Transp. Co. v. Parker, 200 Ark. 620, 140 S.W.2d 997
(1940)—§ 2217
- Missouri Pac. Transp. Co. v. Shepherd, 203 Ark. 412, 157 S.W.2d 501
(1941)—§ 1701
- Mitchell v. Lincoln, 366 Ark. 592, 237 S.W.3d 455 (2006)—§ 1501
- Montgomery Ward & Co., Inc. v. Anderson, 334 Ark. 561, 976 S.W.2d
382 (1998)—§§ 2204, 2215
- Moon Distributors, Inc. v. White, 245 Ark. 627, 434 S.W.2d 56 (1968)—
§§ 610, 2216
- Moore v. Daniel Enterprises, Inc., 2006 WL 1155948 (W.D. Ark. 2006)—
§§ 208, 608
- Moore v. Rye, 255 Ark. 469, 500 S.W.2d 751 (1973)—§§ 604, 901, 911
- Moore Ford Co. v. Smith, 270 Ark. 340, 604 S.W.2d 943 (1980)—§ 108

ARKANSAS MODEL JURY INSTRUCTIONS-CIVIL

Morel v. Lee, 182 Ark. 985, 33 S.W.2d 1110 (1930)—§ 2217
 Morgan v. Cockrell, 173 Ark. 910, 294 S.W. 44 (1927)—§ 1401
 Morris v. Rush, 77 Ark. App. 11, 69 S.W.3d 876 (2002)—§§ 1205, 1207
 Morrison v. Back Yard Burgers, Inc., 91 F.3d 1184 (8th Cir. 1996)—
 § 2806
 Morrow v. First Nat. Bank of Hot Springs, 261 Ark. 568, 550 S.W.2d
 429, 21 U.C.C. Rep. Serv. 1060 (1977)—§ 2522
 Moses v. Bridgeman, 355 Ark. 460, 139 S.W.3d 503 (2003)—§ 604
 MTG Guarneri Mfg., Inc. v. Clouatre, 239 P.2d 202 (Okla. Civ. App.
 2010)—§ 2602
 Myers v. Cooper Clinic, P.A., 2011 Ark. App. 435, 384 S.W.3d 622
 (2011)—§§ 609, 610

N

Napier v. Northrum, 264 Ark. 406, 572 S.W.2d 153 (1978)—§ 1501
 Nashville Lumber Co. v. Busbee, 100 Ark. 76, 139 S.W. 301 (1911)—
 § 1109
 National Bank of Arkansas v. River Crossing Partners, LLC, 2011 Ark.
 475, 385 S.W.3d 754 (2011)—§§ 416, 2444
 National Bank of Commerce v. McNeill Trucking Co., Inc., 309 Ark. 80,
 828 S.W.2d 584 (1992)—§ 2218
 National Bank of Commerce v. Quirk, 323 Ark. 769, 918 S.W.2d 138
 (1996)—§§ 609, 610
 National By-Products, Inc. v. Searcy House Moving Co., Inc., 292 Ark.
 491, 731 S.W.2d 194 (1987)—§ 2218
 NationsBank, N.A. v. Murray Guard, Inc., 343 Ark. 437, 36 S.W.3d 291
 (2001)—§ 307A
 Nationwide Rentals Co., Inc. v. Carter, 298 Ark. 97, 765 S.W.2d 931
 (1989)—§§ 1008, 1013, 1016
 Navorro-Monzo v. Hughes, 297 Ark. 444, 763 S.W.2d 635 (1989)—§§ 403,
 412
 Neal v. J.B. Hunt Transport, Inc., 305 Ark. 97, 805 S.W.2d 643 (1991)—
 § 712
 Nelms v. Martin, 100 Ark. App. 24, 263 S.W.3d 567 (2007)—§ 1501
 Nelson v. Stubblefield, 2009 Ark. 256, 308 S.W.3d 586 (2009)—§ 1501
 Newburger Cotton Co. v. Stevens, 167 Ark. 257, 267 S.W. 777, 40 A.L.R.
 1279 (1925)—§ 425
 Newman v. Crawford Const. Co., 303 Ark. 641, 799 S.W.2d 531 (1990)—
 § 304
 New Prospect Drilling Co. v. First Commercial Trust, N.A., 332 Ark.
 466, 966 S.W.2d 233 (1998)—§ 2216
 Newton v. Clark, 266 Ark. 237, 582 S.W.2d 955 (1979)—§ 709
 Nicholas v. Bingamon, 219 Ark. 748, 244 S.W.2d 782 (1952)—§ 2227
 Nicholson v. Century 21, Ivy Realty, Inc., 307 Ark. 161, 818 S.W.2d 254
 (1991)—§ 402
 Nicholson v. Simmons First Nat. Corp., 312 Ark. 291, 849 S.W.2d 483
 (1993)—§ 402
 Niece v. Elmview Group Home, 131 Wash. 2d 39, 929 P.2d 420 (1997)—
 § 709A
 Nielsen v. Berger-Nielsen, 347 Ark. 996, 69 S.W.3d 414 (2002)—§ 709A

TABLE OF CASES

- Ninth Dist. Production Credit Ass'n v. Ed Duggan, Inc., 821 P.2d 788, 16 U.C.C. Rep. Serv. 2d 853, 27 A.L.R.5th 921 (Colo. 1991)—§ 2445
- Nipper v. Brandon Co., 262 Ark. 17, 553 S.W.2d 27 (1977)—§§ 702, 704
- Nobles v. Casebier, 327 Ark. 440, 938 S.W.2d 849 (1997)—§ 103
- Noland v. Farmers Ins. Co., Inc., 319 Ark. 449, 892 S.W.2d 271 (1995)—§ 2412
- Northland Ins. Co. v. Union Pacific R. Co., 309 Ark. 287, 830 S.W.2d 850 (1992)—§§ 1802, 1805
- Northport Health Services, Inc. v. Owens, 356 Ark. 630, 158 S.W.3d 164 (2004)—§ 407
- Northside Const. Co. v. Huffman, 287 Ark. 145, 697 S.W.2d 89 (1985)—§ 1301
- Northwestern Nat. Life Ins. Co. v. Heslip, 302 Ark. 310, 790 S.W.2d 152 (1990)—§ 2438
- Northwest Nat. Bank v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 25 Ark. App. 279, 757 S.W.2d 182, 8 U.C.C. Rep. Serv. 2d 238 (1988)—§ 2415
- Norton v. Hefner, 132 Ark. 18, 198 S.W. 97 (1917)—§ 1502
- Nucor Corp. v. Kilman, 358 Ark. 107, 186 S.W.3d 720 (2004)—§ 1107

O

- Oates v. St. Louis Southwestern R. Co., 266 Ark. 527, 587 S.W.2d 10 (1979)—§ 502
- Office Machines, Inc. v. Mitchell, 95 Ark. App. 128, 234 S.W.3d 906 (2006)—§ 403
- Olan Mills, Inc. of Tex. v. Dodd, 234 Ark. 495, 353 S.W.2d 22 (1962)—§§ 421, 424
- Ollar v. Spakes, 269 Ark. 488, 601 S.W.2d 868 (1980)—§ 1104
- O'Mara v. Dykema, 328 Ark. 310, 942 S.W.2d 854 (1997)—§ 1207
- O'Neal Ford, Inc. v. Earley, 13 Ark. App. 189, 681 S.W.2d 414, 40 U.C.C. Rep. Serv. 142 (1985)—§ 2518
- Orkin Exterminating Co. v. Wheeling Pipeline, Inc., 263 Ark. 711, 567 S.W.2d 117 (1978)—§ 703
- Orsini v. Larry Moyer Trucking, Inc., 310 Ark. 179, 833 S.W.2d 366 (1992)—§§ 601, 2218
- Orsini v. Larry Moyer Trucking, Inc., 310 Ark. 179, 833 S.W.2d 366—§ 1510
- Ouachita Wilderness Institute, Inc. v. Mergen, 329 Ark. 405, 947 S.W.2d 780 (1997)—§ 306
- Owen v. Dix, 210 Ark. 562, 196 S.W.2d 913 (1946)—§ 2203
- Ozan Lumber Co. v. McNeely, 214 Ark. 657, 217 S.W.2d 341, 8 A.L.R.2d 261 (1949)—§ 709

P

- Pace v. Davis, 2012 Ark. App. 193, 394 S.W.3d 859 (2012)—§ 608
- Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991)—§ 2218
- Page v. Ballard, 2011 Ark. App. 357, 2011 WL 1795303 (2011)—§ 1205
- Page v. Woodson, 211 Ark. 289, 200 S.W.2d 768 (1947)—§ 2435
- Palmer v. Arkansas Council on Economic Educ., 344 Ark. 461, 40 S.W.3d 784 (2001)—§ 403

- P.A.M. Transport, Inc. v. Arkansas Blue Cross and Blue Shield, 315 Ark. 234, 868 S.W.2d 33 (1993)—§ 402
- Parker v. Wideman, 380 F.2d 433 (5th Cir. 1967)—§ 2215
- Parkerson v. Arthur, 83 Ark. App. 240, 125 S.W.3d 825 (2003)—§ 1508
- Parrott v. Mallett, 262 Ark. 525, 558 S.W.2d 152 (1977)—§ 2213
- Pate v. Goyne, 212 Ark. 51, 204 S.W.2d 900 (1947)—§ 2421
- Patrick v. Tyson Foods, Inc., 2016 Ark. App. 221, 489 S.W.3d 683 (2016)—§ 415
- Patton v. Williams, 284 Ark. 187, 680 S.W.2d 707 (1984)—§ 2215
- Paulino v. QHG of Springdale, Inc., 2012 Ark. 55, 386 S.W.3d 462 (2012)—§ 1504
- Pavel Enterprises, Inc. v. A.S. Johnson Co., Inc., 342 Md. 143, 674 A.2d 521 (1996)—§ 2444
- Payne v. Farm Bureau Mut. Ins. Co. of Arkansas, Inc., 298 Ark. 540, 768 S.W.2d 543 (1989)—§ 2301
- Peacock v. 21st Century Wireless Group, Inc., 285 F.3d 1079 (8th Cir. 2002)—§ 2706
- Pearce v. Hollis Const. Co., 212 Ark. 434, 206 S.W.2d 15 (1947)—§ 2423
- Peek v. Henderson, 208 Ark. 238, 185 S.W.2d 704 (1945)—§ 2226A
- Peerless Packing Co., Inc. v. Malone & Hyde, Inc., 180 W. Va. 267, 376 S.E.2d 161, 8 U.C.C. Rep. Serv. 2d 196 (1988)—§ 2445
- Pennington v. Harvest Foods, Inc., 326 Ark. 704, 934 S.W.2d 485 (1996)—§ 1513
- Peoples Bank and Trust Co. of Mountain Home v. Globe Intern. Pub., Inc., 978 F.2d 1065 (8th Cir. 1992)—§ 423
- Perkins Oil Co. of Delaware v. Fitzgerald, 197 Ark. 14, 121 S.W.2d 877 (1938)—§ 2209
- Perry v. Baptist Health, 358 Ark. 238, 189 S.W.3d 54 (2004)—§ 2410
- Pettus v. McDonald, 343 Ark. 507, 36 S.W.3d 745 (2001)—§ 1510
- Peugh v. Oliger, 233 Ark. 281, 345 S.W.2d 610 (1961)—§§ 2216, 2217
- Phelps v. U.S. Life Credit Life Ins. Co., 336 Ark. 257, 984 S.W.2d 425 (1999)—§ 2412
- Philip Morris USA v. Williams, 549 U.S. 346, 127 S. Ct. 1057, 166 L. Ed. 2d 940 (2007)—§ 2218A
- Philip Morris USA Inc. v. Williams, 556 U.S. 178, 129 S. Ct. 1436, 173 L. Ed. 2d 346 (2009)—§ 2218A
- Philip Morris USA Inc. v. Williams, 540 U.S. 801, 124 S. Ct. 56, 157 L. Ed. 2d 12 (2003)—§ 2218A
- Phillips v. Elwood Freeman Co., Inc., 294 Ark. 548, 745 S.W.2d 127 (1988)—§ 609
- Phillips v. Graves, 219 Ark. 806, 245 S.W.2d 394 (1952)—§ 2229
- Phillips v. Marist Soc. of Washington Province, 80 F.3d 274 (8th Cir. 1996)—§ 2404
- Phillips Co-op. Gin Co. v. Toll, 228 Ark. 891, 311 S.W.2d 171 (1958)—§ 209
- Phoenix Assur. Co. v. Loetscher, 215 Ark. 23, 219 S.W.2d 629 (1949)—§ 2305
- Pickens v. Stroud, 9 Ark. App. 96, 653 S.W.2d 146 (1983)—§ 2442
- Pickler v. Fisher, 7 Ark. App. 125, 644 S.W.2d 644 (1983)—§ 1205

TABLE OF CASES

- Pigg v. Ashley County Newspaper, Inc., 253 Ark. 756, 489 S.W.2d 17 (1973)—§ 411
- Pilkington v. Riley, 271 Ark. 746, 610 S.W.2d 570 (1981)—§ 603
- Pine Bluff Co. v. Bobbitt, 168 Ark. 1019, 273 S.W. 1 (1925)—§ 1405
- PLIVA, Inc. v. Mensing, 564 U.S. 604, 131 S. Ct. 2567, 180 L. Ed. 2d 580 (2011)—§ 1002
- Plunkett-Jarrell Grocery Co. v. Terry, 222 Ark. 784, 263 S.W.2d 229, 44 A.L.R.2d 917 (1953)—§ 425
- Pogue v. Transcontinental Ins. Co., 2010 Ark. 222, 2010 WL 1946663 (2010)—§ 2303
- Ponder v. Cartmell, 301 Ark. 409, 784 S.W.2d 758 (1990)—§ 2204
- Ponder v. Gorman, 94 Ark. App. 159, 227 S.W.3d 428 (2006)—§ 608
- Poole v. James, 231 Ark. 810, 332 S.W.2d 833 (1960)—§ 912
- Pope v. Overton, 2011 Ark. 11, 376 S.W.3d 400 (2011)—§§ 2002, 2003
- Porter v. Harshfield, 329 Ark. 130, 948 S.W.2d 83 (1997)—§ 709A
- Porter v. Lincoln, 282 Ark. 258, 668 S.W.2d 11 (1984)—§ 2218
- Potts v. Benjamin, 882 F.2d 1320 (8th Cir. 1989)—§§ 2217, 2218
- Powell v. ISC North, LLC, 2017 Ark. App. 394, 524 S.W.3d 458 (2017)—§ 1109
- Precision Steel Warehouse, Inc. v. Anderson-Martin Machine Co., 313 Ark. 258, 856 S.W.2d 306 (1993)—§ 1010
- Prendergast v. Craft, 102 Ark. App. 237, 284 S.W.3d 104 (2008)—§ 2226A
- Preston v. Stoops, 373 Ark. 591, 285 S.W.3d 606 (2008)—§§ 2426, 2900
- Price v. Watkins, 283 Ark. 502, 678 S.W.2d 762 (1984)—§ 612
- Prickett v. Farrell, 248 Ark. 996, 455 S.W.2d 74 (1970)—§§ 609, 1601
- Primm v. U.S. Fidelity & Guar. Ins. Corp., 324 Ark. 409, 922 S.W.2d 319, 110 Ed. Law Rep. 460 (1996)—§ 2203
- Prince v. Brydon, 307 Or. 146, 764 P.2d 1370 (1988)—§ 2704
- Pritchard v. Times Southwest Broadcasting, Inc., 277 Ark. 458, 642 S.W.2d 877 (1982)—§ 411
- ProAssurance Indem. Co., Inc. v. Metheny, 2012 Ark. 461, 425 S.W.3d 689 (2012)—§ 307A
- Pro-Comp Management, Inc. v. R.K. Enterprises, LLC, 366 Ark. 463, 237 S.W.3d 20 (2006)—§ 2604
- Progressive Eldercare Services-Saline, Inc. v. Cauffiel, 2016 Ark. App. 523, 508 S.W.3d 59 (2016)—§§ 1501, 1504
- Property Owners Imp. Dist. No. 247 of Pulaski County v. Williford, 40 Ark. App. 172, 843 S.W.2d 862 (1992)—§§ 2001, 2002, 2003
- Propst v. McNeill, 326 Ark. 623, 932 S.W.2d 766 (1996)—§ 1105
- Prudential Ins. Co. of Am. v. Stratton, 14 Ark. App. 145, 685 S.W.2d 818 (1985)—§ 2442
- Prudential Insurance Co. of America v. Stratton, 14 Ark. App. 145, 685 S.W.2d 818 (1985)—§ 2428
- Pugh v. Griggs, 327 Ark. 577, 940 S.W.2d 445 (1997)—§ 1510
- Purtle v. Shelton, 251 Ark. 519, 474 S.W.2d 123, 47 A.L.R.3d 609 (1971)—§ 304

Q

- QHG of Springdale, Inc. v. Archer, 2009 Ark. App. 692, 373 S.W.3d 318 (2009)—§§ 2404, 2445

- Quality Petroleum, Inc. v. Windward Petroleum, Inc., 2011 Ark. App. 116, 378 S.W.3d 818 (2011)—§ 403
 Quick v. Woody, 295 Ark. 168, 747 S.W.2d 108 (1988)—§ 2704
 Quinn Companies, Inc. v. Herring-Marathon Group, Inc., 299 Ark. 431, 773 S.W.2d 94 (1989)—§ 2427

R

- Rachels v. Deener, 182 Ark. 931, 33 S.W.2d 39 (1930)—§ 411
 RAD-Razorback Ltd. Partnership v. B.G. Coney Co., 289 Ark. 550, 713 S.W.2d 462 (1986)—§§ 2415, 2419, 2420
 Raines v. Toney, 228 Ark. 1170, 313 S.W.2d 802 (1958)—§ 1513
 Ralston Purina Co. v. McCollum, 271 Ark. 840, 611 S.W.2d 201, 31 U.C.C. Rep. Serv. 440 (Ct. App. 1981)—§ 2444
 Ramsey v. American Auto. Ins. Co., 234 Ark. 1031, 356 S.W.2d 236 (1962)—§ 1107
 Randolph v. ER Arkansas, P.A., 325 Ark. 373, 925 S.W.2d 160 (1996)—§ 1501
 Rathbun v. Ward, 315 Ark. 264, 866 S.W.2d 403 (1993)—§§ 307A, 901
 Reagan v. City of Piggott, 305 Ark. 77, 805 S.W.2d 636 (1991)—§ 1501
 Rebsamen Companies, Inc. v. Arkansas State Hospital Emp. Federal Credit Union, 258 Ark. 160, 522 S.W.2d 845 (1975)—§ 2442
 Redman v. St. Louis Southwestern Ry. Co., 316 Ark. 636, 873 S.W.2d 542 (1994)—§§ 107, 1805
 Reed v. Malone's Mechanical, Inc., 854 F. Supp. 2d 636 (W.D. Ark. 2012)—§ 307A
 Reed v. McGibboney, 243 Ark. 789, 422 S.W.2d 115 (1967)—§§ 712, 901, 912
 Reed v. Williams, 247 Ark. 314, 445 S.W.2d 90 (1969)—§§ 2206, 2443
 Rees v. Smith, 2009 Ark. 169, 301 S.W.3d 467 (2009)—§§ 401, 1512
 Regions Bank v. White, 2009 WL 3148732 (E.D. Ark. 2009)—§§ 208, 608
 Regions Bank & Trust v. Stone County Skilled Nursing Facility, Inc., 345 Ark. 555, 49 S.W.3d 107 (2001)—§ 709A
 Reliance Nat. Indem. Co. v. Jennings, 189 F.3d 689 (8th Cir. 1999)—§ 1510
 Rest Hills Memorial Park, Inc. v. Clayton Chapel Sewer Imp. Dist. No. 233, 6 Ark. App. 180, 639 S.W.2d 519 (1982)—§ 2007
 Rexer v. Carter, 208 Ark. 342, 186 S.W.2d 147 (1945)—§ 602
 Rex Oil Corp. v. Crank, 183 Ark. 819, 38 S.W.2d 1093 (1931)—§ 702
 Reynolds v. Shelter Mut. Ins. Co., 313 Ark. 145, 852 S.W.2d 799 (1993)—§ 2304
 Reynolds Health Care Services, Inc. v. HMNH, Inc., 364 Ark. 168, 217 S.W.3d 797 (2005)—§ 2443
 Rhoads v. Service Mach. Co., 329 F. Supp. 367 (E.D. Ark. 1971)—§ 503
 Rhode v. Kremer, 280 Ark. 136, 655 S.W.2d 410 (1983)—§ 2518
 Rickett v. Hayes, 256 Ark. 893, 511 S.W.2d 187 (1974)—§ 103
 Rigsby v. Rigsby, 356 Ark. 311, 149 S.W.3d 318 (2004)—§ 2444
 R.J. Bob Jones Excavating Contractor, Inc. v. Firemen's Ins. Co. of Newark, New Jersey, 324 Ark. 282, 920 S.W.2d 483 (1996)—§ 2304
 R.K. Enterprise, LLC v. Pro-Comp Management, Inc., 356 Ark. 565, 158 S.W.3d 685 (2004)—§ 2602

TABLE OF CASES

- Robbins v. Johnson, 367 Ark. 506, 241 S.W.3d 747 (2006)—§ 1501
- Roberts Contracting Co., Inc. v. Valentine-Wooten Road Public Facility Bd., 2009 Ark. App. 437, 320 S.W.3d 1 (2009)—§§ 2427, 2428
- Robertson v. Ceola, 255 Ark. 703, 501 S.W.2d 764, 13 U.C.C. Rep. Serv. 753 (1973)—§ 2443
- Robertson Oil Co., Inc. v. Phillips Petroleum Co., 14 F.3d 373 (8th Cir. 1993)—§ 2218
- Robertson Oil Co., Inc. v. Phillips Petroleum Co., 779 F. Supp. 994 (W.D. Ark. 1991)—§ 2218
- Robinson v. Abbott, 292 Ark. 630, 731 S.W.2d 782 (1987)—§ 2218
- Robson v. Tinnin, 322 Ark. 605, 911 S.W.2d 246 (1995)—§ 1501
- Roeder v. U.S., 2014 Ark. 156, 432 S.W.3d 627 (2014)—§ 1108
- Rogers v. Allis-Chalmers Credit Corp., 679 F.2d 138, 33 U.C.C. Rep. Serv. 1574 (8th Cir. 1982)—§ 425
- Rogers v. Crawford, 220 Ark. 385, 247 S.W.2d 1005 (1952)—§ 705
- Rogers v. Kelly, 284 Ark. 50, 679 S.W.2d 184 (1984)—§ 901
- Rogers v. Mallory, 328 Ark. 116, 941 S.W.2d 421 (1997)—§§ 1205, 1206
- Rogers v. Sargent, 2010 Ark. App. 640, 2010 WL 3783696 (2010)—§ 1501
- Rogers v. Stillman, 223 Ark. 779, 268 S.W.2d 614 (1954)—§§ 104, 1601
- Rooney v. Williamson, 167 F.3d 1185 (8th Cir. 1999)—§ 2706
- Ross, 41 Ark. App.—§ 2303
- Ross v. Moore, 30 Ark. App. 207, 785 S.W.2d 243 (1990)—§ 103
- Ross v. Patterson, 307 Ark. 68, 817 S.W.2d 418 (1991)—§ 401
- Ross v. State Farm Mut. Auto. Ins. Co., 41 Ark. App. 75, 848 S.W.2d 948 (1993)—§ 2303
- Ross v. United Services Auto. Ass'n, 320 Ark. 604, 899 S.W.2d 53 (1995)—§ 2303
- Ross & Ross v. St. Louis, I.M. & S. Ry. Co., 120 Ark. 264, 179 S.W. 353 (1915)—§ 2224
- Routh Wrecker Service, Inc. v. Washington, 335 Ark. 232, 980 S.W.2d 240 (1998)—§§ 413, 2218
- Royal Crown Bottling Co. v. Terry, 246 Ark. 128, 437 S.W.2d 474 (1969)—§ 609
- Royal Manor Apartments v. Powell, 258 Ark. 166, 523 S.W.2d 909 (1975)—§ 2442
- Runyan v. Goodrum, 147 Ark. 481, 228 S.W. 397, 13 A.L.R. 1403 (1921)—§ 1503
- Russenberger v. Thomas Pest Control, Inc., 2012 Ark. App. 86, 394 S.W.3d 303 (2012)—§ 211

S

- Safeway Stores, Inc. v. Willmon, 289 Ark. 14, 708 S.W.2d 623 (1986)—§ 1106
- Saforo & Associates, Inc. v. Porocel Corp., 337 Ark. 553, 991 S.W.2d 117 (1999)—§§ 2602, 2604
- Saine v. Comcast Cablevision of Arkansas, Inc., 354 Ark. 492, 126 S.W.3d 339 (2003)—§ 709A
- Saliba v. Saliba, 178 Ark. 250, 11 S.W.2d 774, 61 A.L.R. 1348 (1928)—§ 106A

- Saltzman-Guenthner Clinic, Ltd. v. Burnett, 5 Ark. App. 56, 632 S.W.2d 441 (1982)—§ 2424
- Sanders v. Mincey, 317 Ark. 398, 879 S.W.2d 398 (1994)—§ 1601
- Sanders v. Walker, 298 Ark. 374, 767 S.W.2d 526 (1989)—§§ 1205, 1206
- Sawada v. Walmart Stores, Inc., 2015 Ark. App. 549, 473 S.W.3d 60 (2015)—§ 409
- Scanlon v. Gordon F. Stofer & Bro. Co., 1989 Ohio App. LEXIS 2528 (1989)—§ 714
- Schabe v. Hampton Bays Union Free School Dist., 103 A.D.2d 418, 480 N.Y.S.2d 328, 20 Ed. Law Rep. 929 (2d Dep't 1984)—§ 307A
- Schaeffer v. McGhee, 286 Ark. 113, 689 S.W.2d 537 (1985)—§ 203
- Schmidt v. Gibbs, 305 Ark. 383, 807 S.W.2d 928 (1991)—§§ 609, 610, 1501
- Schmidt v. Pearson, Evans and Chadwick, 326 Ark. 499, 931 S.W.2d 774 (1996)—§ 1510
- Schmidt v. Stearman, 98 Ark. App. 167, 253 S.W.3d 35 (2007)—§§ 401, 425
- Schnitt v. McKellar, 244 Ark. 377, 427 S.W.2d 202 (1968)—§ 2412
- Schuster's, Inc. v. Whitehead, 291 Ark. 180, 722 S.W.2d 862 (1987)—§ 209
- Scollard v. Scollard, 329 Ark. 83, 947 S.W.2d 345 (1997)—§ 402
- Scott-Burr Stores Corp. v. Foster, 197 Ark. 232, 122 S.W.2d 165 (1938)—§ 2205
- Scoville v. Missouri Pac. R. Co., 458 F.2d 639 (8th Cir. 1972)—§ 1805
- Sealing Devices, Inc. v. McKinney, 2009 Ark. App. 412, 321 S.W.3d 270 (2009)—§ 2206
- Sealy Mattress Co. v. Southern Cotton Oil Co., 167 Ark. 405, 268 S.W. 611 (1925)—§ 202
- Searcy, City of v. Roberson, 256 Ark. 1081, 511 S.W.2d 627 (1974)—§ 201
- Selmon v. Metropolitan Life Ins. Co., 372 Ark. 420, 277 S.W.3d 196 (2008)—§ 2304
- Service Communications, Inc. v. Wells, 279 Ark. 378, 651 S.W.2d 100 (1983)—§ 302
- Sexton v. St. Paul Fire & Marine Ins. Co., 275 Ark. 361, 631 S.W.2d 270 (1982)—§ 1501
- Sexton Law Firm, P.A. v. Milligan, 329 Ark. 285, 948 S.W.2d 388 (1997)—§ 1513
- Shaffer v. Yang, 2010 Ark. App. 97, 2010 WL 374191 (2010)—§ 1501
- Shamlin v. Quadrangle Enterprises, Inc., 101 Ark. App. 164, 272 S.W.3d 128 (2008)—§§ 425, 2226A
- Shelter Mut. Ins. Co. v. Williams, 69 Ark. App. 35, 9 S.W.3d 545 (2000)—§ 2303
- Shepherd v. Looper, 293 Ark. 29, 732 S.W.2d 150 (1987)—§ 425
- Shepherd v. Washington County, 331 Ark. 480, 962 S.W.2d 779 (1998)—§ 401
- Showmethemoney Check Cashers, Inc. v. Williams, 342 Ark. 112, 27 S.W.3d 361 (2000)—§ 2402
- Shroeder v. Johnson, 234 Ark. 443, 352 S.W.2d 570 (1962)—§ 905

TABLE OF CASES

- Simmons v. Arkansas State Highway Commission, 259 Ark. 503, 534 S.W.2d 16 (1976)—§ 2006
- Simpson v. Hurt, 294 Ark. 41, 740 S.W.2d 618 (1987)—§ 2203
- Sinclair Refining Co. v. Henderson, 197 Ark. 319, 122 S.W.2d 580 (1938)—§§ 1006, 2216
- Sisemore v. Neal, 236 Ark. 574, 367 S.W.2d 417, 12 A.L.R.3d 929 (1963)—§ 2211
- Skaggs v. Johnson, 323 Ark. 320, 915 S.W.2d 253 (1996)—§ 1501
- Skinner v. Fisher, 120 Ark. 91, 178 S.W. 922 (1915)—§ 2432
- Skokos v. Skokos, 332 Ark. 520, 333 Ark. 396, 968 S.W.2d 26 (1998)—§ 2413
- Slaughter v. Capitol Supply Co., Inc., 2009 Ark. 221, 306 S.W.3d 432 (2009)—§ 106A
- Sluder v. Steak & Ale of Little Rock, Inc., 361 Ark. 267, 206 S.W.3d 213 (2005)—§ 1902
- Smart Chevrolet Co. v. Davis, 262 Ark. 500, 558 S.W.2d 147 (1977)—§ 1010
- Smith v. Aaron, 256 Ark. 414, 508 S.W.2d 320 (1974)—§ 1203
- Smith v. Alexander, 245 Ark. 567, 433 S.W.2d 157 (1968)—§§ 103, 902
- Smith v. Cruthis, 255 Ark. 217, 499 S.W.2d 852 (1973)—§ 1110
- Smith v. Decatur School Dist., 2011 Ark. App. 126, 2011 WL 549057 (2011)—§ 2439
- Smith v. Goble, 248 Ark. 415, 452 S.W.2d 336 (1970)—§ 501
- Smith v. Hansen, 323 Ark. 188, 914 S.W.2d 285 (1996)—§ 2218
- Smith v. Magnet Cove Barium Corp., 212 Ark. 491, 206 S.W.2d 442 (1947)—§ 202
- Smith v. Prudential Property and Cas. Ins. Co., 340 Ark. 335, 10 S.W.3d 846 (2000)—§ 2303
- Smith v. Rogers Group, Inc., 348 Ark. 241, 72 S.W.3d 450 (2002)—§ 1203
- Smith v. Russ, 70 Ark. App. 23, 13 S.W.3d 920, 44 U.C.C. Rep. Serv. 2d 1036 (2000)—§§ 2512, 2522
- Smith v. School Dist. No. 89 of Crawford County, 187 Ark. 405, 59 S.W.2d 1022 (1933)—§ 2409
- Smith v. Stevens, 313 Ark. 534, 855 S.W.2d 323 (1993)—§ 901
- Smith v. U.S., 128 F. Supp. 2d 1227 (E.D. Ark. 2000)—§ 106
- Smith v. Walt Bennett Ford, Inc., 314 Ark. 591, 864 S.W.2d 817 (1993)—§§ 402, 2443
- Smith v. Whitener, 42 Ark. App. 225, 856 S.W.2d 328 (1993)—§ 2445
- Smith v. Whitener, 42 Ark. App.—§ 2445
- Smothers v. Clouette, 326 Ark. 1017, 934 S.W.2d 923 (1996)—§ 211
- Source Logistics, Inc. v. Certain Underwriters at Lloyd's of London Subscribing to Policy No. NA041790U, 2010 Ark. App. 239, 374 S.W.3d 232 (2010)—§ 106A
- Souter v. Carruthers, 237 Ark. 590, 374 S.W.2d 474 (1964)—§ 1203
- Southall v. Little Rock Newspapers, Inc., 332 Ark. 123, 964 S.W.2d 187 (1998)—§ 408
- South Arkansas Petroleum Co. v. Schiesser, 343 Ark. 492, 36 S.W.3d 317 (2001)—§ 416

ARKANSAS MODEL JURY INSTRUCTIONS-CIVIL

- South Beach Beverage Co., Inc. v. Harris Brands, Inc., 355 Ark. 347, 138 S.W.3d 102 (2003)—§§ 201, 2444
- South Cent. Arkansas Elec. Co-op. v. Buck, 354 Ark. 11, 117 S.W.3d 591 (2003)—§ 201
- Southeast Const. Co. v. Ellis, 233 Ark. 72, 342 S.W.2d 485 (1961)—§ 1203
- Southeast X-Ray, Inc. v. Spears, 929 F. Supp. 2d 867 (W.D. Ark. 2013)—§ 2602
- Southern Bldg. Services, Inc. v. City of Ft. Smith, 2013 Ark. App. 306, 427 S.W.3d 763 (2013)—§ 2230
- Southern Bus Co. v. Simpson, 214 Ark. 323, 215 S.W.2d 699 (1948)—§ 2221
- Southern Co., Inc. v. Graham, 271 Ark. 223, 607 S.W.2d 677 (1980)—§§ 1008, 1016
- Southern Farm Bureau Cas. Ins. Co. v. Gottsponer, 245 Ark. 735, 434 S.W.2d 280 (1968)—§ 2301
- Southern Farm Bureau Cas. Ins. Co. v. Pettie, 54 Ark. App. 79, 924 S.W.2d 828 (1996)—§ 2303
- Southern Farm Bureau Casualty Insurance Company v. Shelter Mutual Insurance Company, 2016 Ark. App. 563, 506 S.W.3d 915 (2016)—§ 2301
- Southern Ice & Utilities Co. v. Bryan, 187 Ark. 186, 58 S.W.2d 920 (1933)—§ 2223
- Southern Nat. Ins. Co. v. Williams, 224 Ark. 938, 277 S.W.2d 487 (1955)—§ 2216
- Southern Pipe Coating, Inc. v. Spear & Wood Mfg. Co., 235 Ark. 1021, 363 S.W.2d 912 (1963)—§ 2437
- Southwestern Bell Telephone Co. v. Davis, 247 Ark. 381, 445 S.W.2d 505 (1969)—§ 1102
- Southwestern Bell Telephone Co. v. Harris Co. of Fort Smith, 353 Ark. 487, 109 S.W.3d 637 (2003)—§ 2227
- Southwestern Energy Co. v. Eickenhorst, 955 F. Supp. 1078 (W.D. Ark. 1997)—§ 2601
- Southwestern Gas & Elec. Co. v. Godfrey, 178 Ark. 103, 10 S.W.2d 894 (1928)—§ 2217
- Southwestern Gas & Elec. Co. v. Murdock, 183 Ark. 565, 37 S.W.2d 100 (1931)—§ 1404
- Southwestern Tel. & Tel. Co. v. Bruce, 89 Ark. 581, 117 S.W. 564 (1909)—§ 1405
- Southwestern Underwriters Ins. Co. v. Miller, 254 Ark. 387, 493 S.W.2d 432 (1973)—§ 2301
- Spann v. Lovett & Co., Ltd., 2012 Ark. App. 107, 389 S.W.3d 77 (2012)—§ 2442
- Sparks Regional Medical Center v. Blatt, 55 Ark. App. 311, 935 S.W.2d 304 (1996)—§ 2445
- Sparks Regional Medical Center v. Smith, 63 Ark. App. 131, 976 S.W.2d 396 (1998)—§ 709A
- Spears v. McKinnon, 168 Ark. 357, 270 S.W. 524 (1925)—§ 1501
- Special Task Force on Practice and Procedure in Civil Cases—Ark. R. Civ. P. 9, 49, 52, and Ark. R. App. P.—Civ. 8, In re, 2014 Ark. 340—§ 1501

TABLE OF CASES

- Special Task Force on Practice and Procedure in Civil Cases—Final Report, In re, 2014 Ark. 47—§ 1501
- Stacks v. Arkansas Power & Light Co., 299 Ark. 136, 771 S.W.2d 754 (1989)—§ 1401
- Stacks v. Jones, 323 Ark. 643, 916 S.W.2d 120 (1996)—§ 2230
- Stacy v. Williams, 38 Ark. App. 192, 834 S.W.2d 156 (1992)—§ 2422
- Stalter v. Akers, 303 Ark. 603, 798 S.W.2d 428 (1990)—§ 1105
- Stalter v. Coca-Cola Bottling Co. of Arkansas, 282 Ark. 443, 669 S.W.2d 460, 59 A.L.R.4th 193 (1984)—§ 609
- Standard Oil Co. of Louisiana v. Dumas, 183 Ark. 616, 38 S.W.2d 17 (1931)—§ 1109
- Stanley v. General Media Communications, Inc., 149 F. Supp. 2d 701 (W.D. Ark. 2001)—§ 421
- Stanton-White Dredging Co. v. Braden, 137 Ark. 127, 208 S.W. 598 (1919)—§ 1203
- Starkey Const., Inc. v. Elcon, Inc., 248 Ark. 958, 248 Ark. 978A, 457 S.W.2d 509, 7 U.C.C. Rep. Serv. 923 (1970)—§ 3002
- State v. Diamond Lakes Oil Co., 347 Ark. 618, 66 S.W.3d 613 (2002)—§ 2224
- State Auto Property and Cas. Ins. Co. v. Swaim, 338 Ark. 49, 991 S.W.2d 555 (1999)—§ 2304
- State, Dept. of Career Educ., Div. of Rehabilitation Services v. Means, 2013 Ark. 173, 426 S.W.3d 922 (2013)—§ 3101
- State Farm Mut. Auto. Ins. Co. v. Beavers, 321 Ark. 292, 901 S.W.2d 13 (1995)—§ 2303
- State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585, 60 Fed. R. Evid. Serv. 1349, 1 A.L.R. Fed. 2d 739 (2003)—§§ 2218, 2218A
- State Farm Mut. Auto. Ins. Co. v. Henderson, 356 Ark. 335, 150 S.W.3d 276 (2004)—§ 2301
- State Farm Mut. Auto. Ins. Co. v. LaSage, 262 Ark. 631, 559 S.W.2d 702 (1978)—§ 2301
- State Farm Mut. Auto. Ins. Co. v. Thomas, 316 Ark. 345, 871 S.W.2d 571 (1994)—§ 2303
- Stecker v. First Commercial Trust Co., 331 Ark. 452, 962 S.W.2d 792 (1998)—§ 503
- St. Edward Mercy Medical Center v. Ellison, 58 Ark. App. 100, 946 S.W.2d 726 (1997)—§ 3107
- Steed v. Busby, 268 Ark. 1, 593 S.W.2d 34 (1980)—§§ 2404, 2445
- Steel Erectors, Inc. v. Lee, 253 Ark. 151, 484 S.W.2d 874 (1972)—§ 703
- Stein v. Lukas, 308 Ark. 74, 823 S.W.2d 832 (1992)—§ 2218
- Stephens v. West Pontiac-GMC, Inc., 7 Ark. App. 275, 647 S.W.2d 492 (1983)—§ 2437
- Sterling Drug, Inc. v. Oxford, 294 Ark. 239, 743 S.W.2d 380 (1988)—§ 401
- Stevenson v. Union Pacific R. Co., 354 F.3d 739, 63 Fed. R. Evid. Serv. 166, 57 Fed. R. Serv. 3d 617 (8th Cir. 2004)—§ 106
- Stevenson v. Union Standard Ins. Co., 294 Ark. 651, 746 S.W.2d 39 (1988)—§ 403

ARKANSAS MODEL JURY INSTRUCTIONS-CIVIL

- Stewart Title Guar. Co. v. American Abstract & Title Co., 363 Ark. 530, 215 S.W.3d 596 (2005)—§ 403
- St. Joseph's Regional Health Center v. Munos, 326 Ark. 605, 934 S.W.2d 192 (1996)—§§ 403, 707A
- St. Louis & S.F. Ry. Co. v. Jones, 59 Ark. 105, 26 S.W. 595 (1894)—§ 2224
- St. Louis, I.M. & S.R. Co. v. Brogan, 105 Ark. 533, 151 S.W. 699 (1912)—§ 2219
- St. Louis, I.M. & S.R. Co. v. Devaney, 98 Ark. 83, 135 S.W. 802 (1911)—§ 3503
- St. Louis, I.M. & S. Ry. Co. v. Ayres, 67 Ark. 371, 55 S.W. 159 (1900)—§ 2223
- St. Louis, I.M. & S. Ry. Co. v. Carter, 111 Ark. 272, 164 S.W. 715 (1914)—§ 3503
- St. Louis, I.M. & S. Ry. Co. v. Dague, 118 Ark. 277, 176 S.W. 138 (1915)—§ 2229
- St. Louis, I.M. & S. Ry. Co. v. Jacks, 105 Ark. 347, 151 S.W. 706 (1912)—§§ 2212, 2217
- St. Louis, I.M. & S. Ry. Co. v. Lyman, 57 Ark. 512, 22 S.W. 170 (1893)—§ 2226
- St. Louis, I.M. & S. Ry. Co. v. Magness, 93 Ark. 46, 123 S.W. 786 (1909)—§ 2223
- St. Louis, I.M. & S. Ry. Co. v. Miller, 107 Ark. 276, 154 S.W. 956 (1913)—§ 2223
- St. Louis, I. M. & S. Ry. Co. v. Newman, 94 Ark. 458, 127 S.W. 735 (1910)—§ 1601
- St. Louis, I.M. & S. Ry. Co. v. Saunders, 85 Ark. 111, 107 S.W. 194 (1908)—§ 2226
- St. Louis, I.M. & S. Ry. Co. v. Standifer, 81 Ark. 275, 99 S.W. 81 (1907)—§ 2216
- St. Louis, I.M. & S. Ry. Co. v. Waren, 65 Ark. 619, 48 S.W. 222 (1898)—§ 2213
- St. Louis-San Francisco Ry. Co. v. McCarn, 212 Ark. 287, 205 S.W.2d 704 (1947)—§ 2217
- St. Louis-San Francisco Ry. Co. v. Thurman, 213 Ark. 840, 213 S.W.2d 362 (1948)—§ 1803
- St. Louis S.F. Ry. Co. v. Perryman, 213 Ark. 550, 211 S.W.2d 647 (1948)—§§ 1801, 2217
- St. Louis Southwestern Ry. Co. v. Ellis, 169 Ark. 682, 276 S.W. 996 (1925)—§ 2226
- St. Louis Southwestern Ry. Co. v. Evans, 254 Ark. 762, 497 S.W.2d 692 (1973)—§§ 602, 1802, 1805
- St. Louis Southwestern Ry. Co. v. Farrell, 242 Ark. 757, 416 S.W.2d 334 (1967)—§ 1805
- St. Louis Southwestern Ry. Co. v. Jackson, 242 Ark. 858, 416 S.W.2d 273 (1967)—§ 1805
- St. Louis Southwestern Ry. Co. v. Morris, 76 Ark. 542, 89 S.W. 846 (1905)—§ 2226
- St. Louis Southwestern Ry. Co. v. Pennington, 261 Ark. 650, 553 S.W.2d 436 (1977)—§§ 501, 502, 503, 912, 1804, 2216, 2217

TABLE OF CASES

- St. Louis Southwestern Ry. Co. v. Robinson, 228 Ark. 418, 308 S.W.2d 282 (1957)—§ 1801
- St. Mary's Hospital, Inc. v. Bynum, 264 Ark. 691, 573 S.W.2d 914 (1978)—§ 302
- Stocker v. Hall, 269 Ark. 468, 602 S.W.2d 662 (1980)—§ 2427
- Stockton v. Baker, 213 Ark. 918, 213 S.W.2d 896 (1948)—§ 712
- Stockton v. Sentry Ins., 337 Ark. 507, 989 S.W.2d 914 (1999)—§ 2801
- Stokes v. Roberts, 289 Ark. 319, 711 S.W.2d 757 (1986)—§ 2420
- Stokes v. Southern States Co-op., Inc., 651 F.3d 911 (8th Cir. 2011)—§ 413
- Stoltze v. Arkansas Valley Elec. Co-op. Corp., 354 Ark. 601, 127 S.W.3d 466 (2003)—§ 709
- Stoner v. Houston, 265 Ark. 928, 582 S.W.2d 28 (1979)—§§ 419, 2226A
- St. Paul Fire & Marine Ins. Co. v. Green, 181 Ark. 1096, 29 S.W.2d 304 (1930)—§ 2305
- St. Paul Fire and Marine Ins. Co. v. Knight, 297 Ark. 555, 764 S.W.2d 601 (1989)—§ 709A
- Strahan v. Webb, 231 Ark. 426, 330 S.W.2d 291 (1959)—§ 2216
- Strange v. Stovall, 261 Ark. 53, 546 S.W.2d 421 (1977)—§ 1602
- Stull v. Ragsdale, 273 Ark. 277, 620 S.W.2d 264, 26 A.L.R.4th 385 (1981)—§§ 307A, 2217
- Sturgis v. Skokos, 335 Ark. 41, 977 S.W.2d 217 (1998)—§§ 1510, 1511, 2424
- Stutzenbaker v. Arkansas Power & Light Co., 187 Ark. 438, 59 S.W.2d 1037 (1933)—§ 109
- St. Vincent Infirmary Medical Center v. Shelton, 2013 Ark. 38, 425 S.W.3d 761 (2013)—§ 307A
- Suggs v. Stanley, 324 F.3d 672, 60 Fed. R. Evid. Serv. 1513 (8th Cir. 2003)—§ 409
- Sundeen v. Kroger, 355 Ark. 138, 133 S.W.3d 393 (2003)—§ 413
- Suneson v. Holloway Const. Co., 337 Ark. 571, 992 S.W.2d 79 (1999)—§ 1203
- Superior Federal Bank v. Mackey, 84 Ark. App. 1, 129 S.W.3d 324 (2003)—§§ 106, 409, 2444
- Sutton v. Sutton, 28 Ark. App. 165, 771 S.W.2d 791 (1989)—§ 2412
- Swafford v. Sealtest Foods Division of National Dairy Products Corp., 252 Ark. 1182, 483 S.W.2d 202 (1972)—§ 2407
- Swenson v. Hampton, 244 Ark. 104, 424 S.W.2d 165 (1968)—§ 2206
- Swindle v. Thornton, 229 Ark. 437, 316 S.W.2d 202 (1958)—§ 2206

T

- Tackett v. Merchant's Security Patrol, 73 Ark. App. 358, 44 S.W.3d 349 (2001)—§ 1104
- Takeya v. Didion, 294 Ark. 611, 745 S.W.2d 614 (1988)—§ 2218
- Tandy Corp. v. Bone, 283 Ark. 399, 678 S.W.2d 312, 52 A.L.R.4th 839 (1984)—§§ 401, 2218
- Tatum v. Rester, 241 Ark. 1059, 242 Ark. 271, 412 S.W.2d 293 (1967)—§ 1107
- Taylor v. George, 92 Ark. App. 264, 212 S.W.3d 17 (2005)—§ 2230

ARKANSAS MODEL JURY INSTRUCTIONS-CIVIL

- Taylor v. Gill, 326 Ark. 1040, 934 S.W.2d 919 (1996)—§ 701
- Taylor v. Hinkle, 360 Ark. 121, 200 S.W.3d 387 (2004)—§ 1513
- Taylor v. Riddell, 320 Ark. 394, 896 S.W.2d 891 (1995)—§§ 104, 609, 610, 1501
- Telcoe Credit Union v. Eackles, 293 Ark. 149, 732 S.W.2d 477 (1987)—§ 2429
- Texas & St. Louis Ry. v. Orr, 46 Ark. 182, 1885 WL 752 (1885)—§ 2214
- Texas Oil & Gas Corp. v. Hawkins Oil & Gas, Inc., 282 Ark. 268, 668 S.W.2d 16 (1984)—§ 1513
- the Exxon Valdez, In re, 296 F. Supp. 2d 1071 (D. Alaska 2004)—§ 2218
- Thiel v. Dove, 229 Ark. 601, 317 S.W.2d 121 (1958)—§§ 409, 705, 706, 711
- Thomas v. Kellett, 260 Ark. 548, 542 S.W.2d 501 (1976)—§ 910
- Thomas v. Newman, 262 Ark. 42, 553 S.W.2d 459 (1977)—§§ 604, 911
- Thomas v. Sessions, 307 Ark. 203, 818 S.W.2d 940 (1991)—§ 1503
- Thomas v. Stewart, 347 Ark. 33, 60 S.W.3d 415 (2001)—§ 1105
- Thomas Auto Co., Inc. v. Craft, 297 Ark. 492, 763 S.W.2d 651, 8 U.C.C. Rep. Serv. 2d 29 (1989)—§ 2218
- Thomson Newspaper Pub., Inc. v. Coody, 320 Ark. 455, 896 S.W.2d 897 (1995)—§ 408
- Threlkeld v. Worsham, 30 Ark. App. 251, 785 S.W.2d 249 (1990)—§ 1013
- Throesch v. U.S. Fidelity and Guar. Co., 255 F.3d 551 (8th Cir. 2001)—§ 2301
- Tilton v. Marshall, 925 S.W.2d 672 (Tex. 1996)—§ 714
- Time, Inc. v. Hill, 385 U.S. 374, 87 S. Ct. 534, 17 L. Ed. 2d 456 (1967)—§ 423
- Timmons v. Clayton, 222 Ark. 327, 259 S.W.2d 501 (1953)—§ 1110
- Tinsley v. Cross Development Co., 277 Ark. 306, 642 S.W.2d 286 (1982)—§ 611
- Titan Oil & Gas, Inc. v. Shipley, 257 Ark. 278, 517 S.W.2d 210 (1974)—§ 2704
- Toner v. Lederle Laboratories, a Division of American Cyanamid Co., 112 Idaho 328, 732 P.2d 297 (1987)—§ 1009
- Totem Marine Tug & Barge, Inc. v. Alyeska Pipeline Service Co., 584 P.2d 15, 9 A.L.R.4th 928 (Alaska 1978)—§ 2435
- Townes v. Oklahoma Mill Co., 85 Ark. 596, 109 S.W. 548 (1908)—§ 2441
- Trakru v. Mathews, 2014 Ark. App. 154, 434 S.W.3d 10 (2014)—§ 2406
- Trammell v. Hooks, 2013 Ark. App. 576, 2013 WL 5593115 (2013)—§ 2431
- Travis Lumber Co. v. Deichman, 2009 Ark. 299, 319 S.W.3d 239 (2009)—§ 2226A
- Tremco, Inc. v. Valley Aluminum Products Corp., 38 Ark. App. 143, 831 S.W.2d 156, 18 U.C.C. Rep. Serv. 2d 168 (1992)—§§ 2443, 2522
- Tri-B Advertising Co. v. Thomas, 278 Ark. 58, 643 S.W.2d 547 (1982)—§ 1110
- Tri-Eagle Enterprises v. Regions Bank, 2010 Ark. App. 64, 373 S.W.3d 399 (2010)—§ 2424
- TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 96 S. Ct. 2126, 48 L. Ed. 2d 757 (1976)—§ 2700
- Tucker v. Sullivan, 307 Ark. 440, 821 S.W.2d 470 (1991)—§§ 1103, 1104, 1107

TABLE OF CASES

- Tucker Duck & Rubber Co. v. Byram, 206 Ark. 828, 177 S.W.2d 759 (1944)—§ 2409
- Tunnel v. Progressive Northern Ins. Co., 80 Ark. App. 215, 95 S.W.3d 1 (2003)—§ 2301
- Turley v. Staley, 2009 Ark. App. 840, 372 S.W.3d 821 (2009)—§ 2418
- Twin City Bank v. Isaacs, 283 Ark. 127, 672 S.W.2d 651, 39 U.C.C. Rep. Serv. 35 (1984)—§ 2230
- TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 113 S. Ct. 2711, 125 L. Ed. 2d 366 (1993)—§ 2218
- TXO Production Corp. v. Page Farms, Inc., 287 Ark. 304, 698 S.W.2d 791 (1985)—§ 2427
- Tyson Foods, Inc. v. ConAgra, Inc., 349 Ark. 469, 79 S.W.3d 326 (2002)—§ 2602
- Tyson Foods, Inc. v. Davis, 347 Ark. 566, 66 S.W.3d 568 (2002)—§§ 201, 2444

U

- Undem v. First Nat. Bank, Springdale, Ark., 46 Ark. App. 158, 879 S.W.2d 451 (1994)—§§ 402, 2433
- Unigard Sec. Ins. Co. v. Murphy Oil USA, Inc., 331 Ark. 211, 962 S.W.2d 735 (1998)—§ 2412
- Union Nat. Bank of Little Rock v. Daneshvar, 33 Ark. App. 171, 803 S.W.2d 567 (1991)—§ 3006
- Union Nat. Bank of Little Rock v. Kutait, 312 Ark. 14, 846 S.W.2d 652 (1993)—§ 416
- Union Pacific R. Co. v. Sharp, 330 Ark. 174, 952 S.W.2d 658 (1997)—§ 1805
- Union Pacific R.R. Co. v. Barber, 356 Ark. 268, 149 S.W.3d 325 (2004)—§§ 106, 201
- United Bilt Homes, Inc. v. Sampson, 310 Ark. 47, 832 S.W.2d 502 (1992)—§ 403
- United Ins. Co. of America v. Murphy, 331 Ark. 364, 961 S.W.2d 752 (1998)—§§ 407, 409, 411
- Universal Sec. Ins. Co. v. Ring, 298 Ark. 582, 769 S.W.2d 750, 8 U.C.C. Rep. Serv. 2d 1174 (1989)—§ 2420
- Unlaub Co., Inc. v. Sexton, 568 F.2d 72, 23 U.C.C. Rep. Serv. 69 (8th Cir. 1977)—§ 2525
- Unum Life Ins. Co. of America v. Edwards, 362 Ark. 624, 210 S.W.3d 84 (2005)—§ 2304

V

- Van Dalsen v. Inman, 238 Ark. 237, 379 S.W.2d 261 (1964)—§ 702
- Van Dyke v. Glover, 326 Ark. 736, 934 S.W.2d 204 (1996)—§ 2444
- Vanlandingham v. Gartman, 236 Ark. 504, 367 S.W.2d 111 (1963)—§ 2205
- Vanoven v. Chesapeake Energy Corp., 2011 WL 1042251 (E.D. Ark. 2011)—§§ 2900, 2901
- Vanoven v. Hardin, 233 Ark. 301, 344 S.W.2d 340 (1961)—§ 1002
- Vaught v. Ross, 244 Ark. 1218, 428 S.W.2d 631 (1968)—§ 804
- Venturi, Inc. v. Adkisson, 261 Ark. 855, 552 S.W.2d 643, 22 U.C.C. Rep. Serv. 13 (1977)—§§ 2417, 2418

- Vickery v. Ballentine, 293 Ark. 54, 732 S.W.2d 160 (1987)—§§ 2216, 2217, 2218
- Vigoro Industries, Inc. v. Cleveland Chemical Co. of Arkansas, Inc., 866 F. Supp. 1150 (E.D. Ark. 1994)—§ 2602
- Viking Ins. Co. of Wisconsin v. Jester, 310 Ark. 317, 836 S.W.2d 371 (1992)—§ 2218
- Volvo Trademark Holding Aktiebolaget v. Clark Machinery Co., 510 F.3d 474 (4th Cir. 2007)—§ 2802

W

- Walcott & Steele, Inc. v. Carpenter, 246 Ark. 95, 436 S.W.2d 820, 6 U.C.C. Rep. Serv. 89 (1969)—§ 1012
- Wallace v. Broyles, 331 Ark. 58, 332 Ark. 189, 961 S.W.2d 712, 124 Ed. Law Rep. 739 (1998)—§ 302
- Wallis v. Ford Motor Co., 362 Ark. 317, 208 S.W.3d 153 (2005)—§§ 402, 2900
- Wal-Mart Stores, Inc. v. Binns, 341 Ark. 157, 15 S.W.3d 320 (2000)—§§ 413, 414, 2218
- Wal-Mart Stores, Inc. v. Kilgore, 85 Ark. App. 231, 148 S.W.3d 754 (2004)—§ 2215
- Wal-Mart Stores, Inc. v. Lee, 348 Ark. 707, 74 S.W.3d 634 (2002)—§§ 407, 409, 411, 412, 420, 423, 424
- Wal-Mart Stores, Inc. v. P.O. Market, Inc., 347 Ark. 651, 66 S.W.3d 620 (2002)—§ 2602
- Wal-Mart Stores, Inc. v. Regions Bank Trust Dept., 347 Ark. 826, 69 S.W.3d 20 (2002)—§ 1106
- Walt Bennett Ford, Inc. v. Pulaski County Special School Dist., 274 Ark. 208, 624 S.W.2d 426, 1 Ed. Law Rep. 1019 (1981)—§ 403
- Walton v. Sherwin-Williams Co., 191 F.2d 277 (8th Cir. 1951)—§ 1003
- Ward v. Blackwood, 41 Ark. 295, 1883 WL 1269 (1883)—§§ 420, 421, 422, 423
- Ward v. Consolidated Underwriters, 259 Ark. 696, 535 S.W.2d 830 (1976)—§ 2301
- Ward v. Haralson, 196 Ark. 785, 120 S.W.2d 322 (1938)—§ 902
- Ward v. Williams, 354 Ark. 168, 118 S.W.3d 513 (2003)—§§ 408, 2218, 2425
- Ward v. Worthen Bank & Trust Co., N.A., 284 Ark. 355, 681 S.W.2d 365 (1984)—§ 2444
- Wasson v. Warren, 245 Ark. 719, 434 S.W.2d 51 (1968)—§ 902
- Watson v. Miears, 612 F. Supp. 1235 (W.D. Ark. 1984)—§ 2525
- Watson's Carpet & Floor Covering, Inc. v. McCormick, 2007 Tenn. App. LEXIS 27 (January 18, 2007)—§ 714
- Wawak v. Stewart, 247 Ark. 1093, 449 S.W.2d 922 (1970)—§ 1205
- Webb v. Pearson, 244 Ark. 109, 424 S.W.2d 145 (1968)—§§ 1103, 1107
- Weigh Systems South, Inc. v. Mark's Scales & Equipment, Inc., 347 Ark. 868, 68 S.W.3d 299 (2002)—§ 2602
- Welch v. Cooper, 11 Ark. App. 263, 670 S.W.2d 454 (1984)—§ 2415
- Welter v. Curry, 260 Ark. 287, 539 S.W.2d 264 (1976)—§§ 2202, 2213
- West, 305 Ark. at—§ 1008
- West v. Searle & Co., 305 Ark. 33, 806 S.W.2d 608 (1991)—§§ 1002, 1003, 1008, 1009

TABLE OF CASES

- Westark Surgical Clinic, P.A. v. Weisse, 279 Ark. 227, 650 S.W.2d 571 (1983)—§ 2417
- Western Arkansas Tel. Co. v. Cotton, 259 Ark. 216, 532 S.W.2d 424 (1976)—§ 709
- Western Geophysical Co. of America v. Mason, 240 Ark. 767, 402 S.W.2d 657 (1966)—§ 1108
- Western Union Telegraph Co. v. Aubrey, 61 Ark. 613, 33 S.W. 1063 (1896)—§ 2401
- Western World Ins. Co., Inc. v. Branch, 332 Ark. 427, 965 S.W.2d 760 (1998)—§ 2412
- West Union v. Vostatek, 302 Ark. 219, 788 S.W.2d 952 (1990)—§ 2204
- Wetzel v. Regions Bank, 649 F.3d 831 (8th Cir. 2011)—§ 2444
- Whaley v. Niven, 175 Ark. 839, 1 S.W.2d 3 (1927)—§ 202
- Wheeler v. Bennett, 312 Ark. 411, 849 S.W.2d 952 (1993)—§§ 2202, 2207
- Wheeler v. Phillips Development Corp., 329 Ark. 354, 947 S.W.2d 380 (1997)—§ 1107
- Whistle-Vess Bottling Co. v. Owens, 249 Ark. 424, 459 S.W.2d 562 (1970)—§§ 913, 914
- White v. Brewer, 295 Ark. 666, 750 S.W.2d 956 (1988)—§ 901
- White v. Ford Motor Co., 500 F.3d 963 (9th Cir. 2007)—§ 2218A
- White v. Mitchell, 263 Ark. 787, 568 S.W.2d 216 (1978)—§ 1501
- White v. Sims, 211 Ark. 499, 201 S.W.2d 21 (1947)—§ 702
- White River Rural Water Dist. v. Moon, 310 Ark. 624, 839 S.W.2d 211 (1992)—§§ 302, 501
- Whiteside v. Russellville Newspapers, Inc., 2009 Ark. 135, 295 S.W.3d 798 (2009)—§ 410
- Whitley v. Irwin, 250 Ark. 543, 465 S.W.2d 906 (1971)—§ 2445
- Whitlock v. Smith, 297 Ark. 399, 762 S.W.2d 782 (1989)—§ 301
- Wiles v. Webb, 329 Ark. 108, 946 S.W.2d 685 (1997)—§ 303
- Wilkes v. Stacy, 113 Ark. 556, 169 S.W. 796 (1914)—§§ 2413, 2414
- Williams, 292 Ark. at—§ 1008
- Williams v. American Broadcasting Companies, Inc., 96 F.R.D. 658, 12 Fed. R. Evid. Serv. 1108, 35 Fed. R. Serv. 2d 1558 (W.D. Ark. 1983)—§§ 420, 422
- Williams v. ConAgra Poultry Co., 378 F.3d 790, 64 Fed. R. Evid. Serv. 1256 (8th Cir. 2004)—§ 2218A
- Williams v. Davidson, 241 Ark. 699, 409 S.W.2d 311 (1966)—§ 605
- Williams v. First Unum Life Ins. Co., 358 Ark. 224, 188 S.W.3d 908 (2004)—§ 2412
- Williams v. Gates, 275 Ark. 381, 630 S.W.2d 34 (1982)—§ 2204
- Williams v. Joyner-Cranford-Burke Const. Co., 285 Ark. 134, 685 S.W.2d 503 (1985)—§ 2304
- Williams v. Mozark Fire Extinguisher Co., 318 Ark. 792, 888 S.W.2d 303, 26 U.C.C. Rep. Serv. 2d 1116 (1994)—§§ 1010, 2507
- Williams v. Oklahoma Tire & Supply Co., 85 F. Supp. 260 (W.D. Ark. 1949)—§ 1006
- Williams v. Philip Morris Inc., 344 Or. 45, 176 P.3d 1255 (2008)—§ 2218A
- Williams v. Shackelford, 2017 Ark. App. 149, 515 S.W.3d 642 (2017)—§ 201

ARKANSAS MODEL JURY INSTRUCTIONS-CIVIL

- Williams v. Smart Chevrolet Co., 292 Ark. 376, 730 S.W.2d 479, 65 A.L.R.4th 337 (1987)—§§ 1008, 1016
- Williamson v. Elrod, 348 Ark. 307, 72 S.W.3d 489 (2002)—§ 1501
- Williamson v. Garrigus, 228 Ark. 705, 310 S.W.2d 8 (1958)—§ 911
- Williamson v. Sanofi Winthrop Pharmaceuticals, Inc., 347 Ark. 89, 60 S.W.3d 428 (2001)—§ 2402
- Willis v. Crestpark of Wynne, Inc. (Intermediate), 279 Ark. 456, 652 S.W.2d 625 (1983)—§ 1106
- Willson Safety Products v. Eschenbrenner, 302 Ark. 228, 788 S.W.2d 729 (1990)—§ 2204
- Wilmoth v. Southwest Arkansas Utilities Corporation, 2015 Ark. App. 185, 457 S.W.3d 694 (2015)—§ 2004
- Wilson v. Davis, 138 Ark. 111, 211 S.W. 152 (1919)—§§ 713, 714
- Wilson v. Evans, 284 Ark. 101, 679 S.W.2d 205 (1984)—§ 503
- Windsong Enterprises, Inc. v. Upton, 366 Ark. 23, 233 S.W.3d 145 (2006)—§ 403
- Wingate Taylor-Maid Transp., Inc. v. Baker, 310 Ark. 731, 840 S.W.2d 179 (1992)—§ 901
- Wingfield v. Page, 278 Ark. 276, 644 S.W.2d 940 (1983)—§§ 1205, 1207
- Wisconsin & Arkansas Lumber Co. v. Scott, 153 Ark. 65, 239 S.W. 391 (1922)—§ 501
- W.M. Bashlin Co. v. Smith, 277 Ark. 406, 643 S.W.2d 526 (1982)—§ 1013
- Wochos v. Woolverton, 2010 Ark. App. 802, 378 S.W.3d 280 (2010)—§ 1513
- Wolford v. St. Paul Fire & Marine Ins. Co., 331 Ark. 426, 961 S.W.2d 743 (1998)—§ 1501
- Wolk v. Teledyne Industries, Inc., 475 F. Supp. 2d 491 (E.D. Pa. 2007)—§ 714
- Wood v. Central Ark. Milk Producers Ass'n, 233 Ark. 958, 349 S.W.2d 811 (1961)—§ 702
- Wood v. Minnesota Mining and Mfg. Co., 112 F.3d 306, 46 Fed. R. Evid. Serv. 1483 (8th Cir. 1997)—§ 1802
- Woodhaven v. Kennedy Sheet Metal, 304 Ark. at—§ 2445
- Woodhaven Homes, Inc. v. Kennedy Sheet Metal Co., 304 Ark. 415, 803 S.W.2d 508 (1991)—§ 2445
- Woodruff Elec. Co-op. Corp. v. Daniel, 251 Ark. 468, 472 S.W.2d 919 (1971)—§ 1403
- Woods v. Hopmann Machinery, Inc., 301 Ark. 134, 782 S.W.2d 363 (1990)—§ 1011
- Wortham v. Little Rock Newspapers, Inc., 273 Ark. 179, 618 S.W.2d 156 (1981)—§ 411
- Worthington v. Roberts, 304 Ark. 551, 803 S.W.2d 906 (1991)—§ 2226A
- W. R. Grimshaw Co. v. Nevil C. Withrow Co., 248 F.2d 896 (8th Cir. 1957)—§ 2435
- Wright v. Covey, 233 Ark. 798, 349 S.W.2d 344, 90 A.L.R.2d 1033 (1961)—§§ 307A, 901
- Wyeth v. Levine, 555 U.S. 555, 129 S. Ct. 1187, 173 L. Ed. 2d 51 (2009)—§ 1002
- Wynn v. Sklar & Phillips Oil Co., 354 Ark. 332, 493 S.W.2d 439 (1973)—§ 2415

TABLE OF CASES

Y

- Yahraus v. Continental Oil Co., 218 Ark. 872, 239 S.W.2d 594 (1951)—
§ 1513
- Yam's Inc. v. Moore, 319 Ark. 111, 890 S.W.2d 246 (1994)—§ 2205
- Yant v. Woods, 353 Ark. 786, 120 S.W.3d 574 (2003)—§ 712
- Yarborough v. DeVilbiss Air Power, Inc., 321 F.3d 728 (8th Cir. 2003)—
§ 2426
- Yazdianpour v. Safeblood Technologies, Inc., 779 F.3d 530 (8th Cir.
2015)—§ 402
- Yellow Cab Co. v. Dossett, 244 Ark. 554, 426 S.W.2d 792 (1968)—§ 1701
- Yielding v. Chrysler Motor Co., Inc., 301 Ark. 271, 783 S.W.2d 353
(1990)—§§ 1008, 1016
- Yocum v. Holmes, 222 Ark. 251, 258 S.W.2d 535 (1953)—§ 911
- Yonts v. Public Service Co. of Ark., 179 Ark. 695, 17 S.W.2d 886
(1929)—§ 2011
- Young v. Arkansas State Highway Commission, 242 Ark. 812, 415
S.W.2d 575 (1967)—§§ 2002, 2003
- Young v. Paxton, 316 Ark. 655, 873 S.W.2d 546 (1994)—§§ 1103, 1104,
1107
- Youngman v. State Farm Mut. Auto. Ins. Co., 334 Ark. 73, 971 S.W.2d
248 (1998)—§ 2301
- Younts v. Baldor Elec. Co., Inc., 310 Ark. 86, 832 S.W.2d 832 (1992)—
§ 2215
- Youree, 99 Ark. App.—§ 2406
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§ 2427

Index

ABNORMALLY DANGEROUS

Railroads, duty to warn of
abnormally dangerous cross-
ing, **1805**

ABSOLUTE LIABILITY

Owners and occupiers of land,
ultrahazardous activities,
1108

ABUSE OF PROCESS

Generally, **416**
Burden of proof, claim for dam-
ages based upon abuse of
process, **416**

ACCEPTANCE OR REJECTION

Contracts, this index
Offer and Acceptance, this index
UCC Sales Contracts, this index

ACCORD AND SATISFACTION

Contracts, accord and satisfaction
as defense, **2431**

ACQUISITION

Rules of the road, right of way,
909

ACT OF GOD

Negligence, **611**

ACTING IN CONCERT

Employment, **713**

ACTION OR PROCEEDINGS

UCC sales contracts, damages in
action for price, **2525**

ADDITION OR ADDITIONAL MATTERS

Negligence, res ipsa loquitur in
addition to specified acts of,
610

UCC sales contracts, additional
terms in acceptance or
confirmation, **2505**

ADMITTED LIABILITY

Generally, **210**

ADVERSE INFERENCE

Generally, **106A**

ADVICE OF COUNSEL

Malicious prosecution, defense of
acting upon advice of
counsel, **415**

AFFIRMATIVE DEFENSE

Burden of proof, **206**

AGENCY

Generally, **701, 704 to 708**
Burden of proof, agent, **209**
Comparative Fault, this index
Definitions, **701, 702**
Deviation from route, **704**
Imputed conduct, independent
contractor, **708**
Independent contractors, **707 to
709**
Inherently dangerous work, inde-
pendent contractor, **708**
Minor driver's parent as pas-
senger, **706**
Motor vehicles
Deviation from route, **704**
Minor driver's parent as pas-
senger, **706**
Owner of vehicle as passenger,
705
Passenger in vehicle, **705, 706**
Route, deviation from, **704**
Owner of vehicle as passenger,
705
Passenger in vehicle, **705, 706**
Route, deviation from, **704**

AGGRAVATION

Damages, aggravation of pre-
existing condition, **2203**

ALCOHOLIC BEVERAGES

Intoxication, this index

ALTERATION OF INSTRUMENTS

Bank deposits and collections, negligence, **3006**

AMBIGUITY

Contract language, **2412**

ANIMALS

Generally, **1601 to 1604**

Comparative fault, liability for dangerous animals, **1604**

Custodian, duty of, **1601**

Dangerous animals, liability for Generally, **1602 to 1604**

Comparative fault, **1604**

Defenses, **1603**

Defenses, liability for dangerous animals, **1603**

Duty of owner or custodian, **1601**

Owner, duty of, **1601**

ANTICIPATION

Negligence, duty to anticipate behavior of children, **604**

APPLIANCES

Safety Appliance and Boiler Inspection Acts, **Chapter 20**

APPROPRIATION

Invasion of privacy by appropriation, claim for damages based upon, **421**

APPROVAL

Consent or Approval, this index

ARCHITECT

Construction work, standard of care, **1204**

ASSAULT AND BATTERY

Generally, **417, 418**

Burden of proof, claim for based upon assault and battery, **417, 418**

ASSIGNMENT

Franchise Practices Act, definition of assignment, **2807**

ASSUMPTION OF RISK

Defined, **306**

ATTEMPTED RESCUE

Negligence, **612**

ATTORNEYS

Malicious prosecution, defense of acting upon advice of counsel, **415**

Malpractice and breach of fiduciary duty, attorney negligence, **1510, 1511**

ATTRACTIVE NUISANCE

Owners and occupiers of land, burden of proof, **1109**

AT-WILL DOCTRINE

Employment, **3107**

AUTHORITY AND AUTHORIZATION

Employment, scope of authority, **702**

AUTOMOBILE INSURANCE

Uninsured Motorist Coverage, this index

AUTOMOBILES

Motor Vehicles, this index

BAD FAITH

Good Faith, this index

BANK DEPOSITS AND COLLECTIONS

Generally, **3001 to 3006**

Alteration of instrument, negligence contributing to, **3006**

Damages

Improper payment of check by bank, **3001**

Ordinary care, failure to exercise, **3002**

Defense, failure to promptly notify, loss allocation, **3003**

Definitions

Good faith, **3005**

Ordinary care, **3004**

BANK DEPOSITS AND COLLECTIONS—Cont'd

- Forged signature, negligence contributing to, 3006
- Good faith defined, 3005
- Improper payment of check by bank, 3001
- Negligence contributing to forged signature or alteration of instrument, 3006
- Ordinary care
 - Damages for failure to exercise, 3002
 - Definitions, 3004

BATTERY

- Assault and Battery, this index

BEHAVIOR OF CHILDREN

- Negligence, duty to anticipate behavior of children, 604

BELLS

- Railroad crossing, duty to sound bell for, 1801

BOILERS

- Safety Appliance and Boiler Inspection Acts, Chapter 20

BORROWED SERVANT

- Employment, 707A

BREACH OF CONTRACT

- Contracts, this index

BREACH OF FIDUCIARY DUTY

- Malpractice and Breach of Fiduciary Duty, this index

BREACH OF UCC WARRANTY

- UCC Sales Contracts, this index

BURDEN OF PROOF

- Abuse of process, claim for damages based upon, 416
- Affirmative defenses, 206
- Agent, 209
- Assault and battery, claim for based upon, 417, 418
- Attractive nuisance, 1109
- Damages, claim for based on negligence, 203

BURDEN OF PROOF—Cont'd

- Defenses, affirmative defenses, 206
- Definitions
 - Burden of proof, 202
 - Preponderance of evidence, 202
- Eminent domain, 2001
- Imputed conduct, 207, 208
- Independent contractor, 209
- Insurance, this index
- Intentional Torts, this index
- Malicious prosecution, claim for damages based upon, 413
- Malpractice and Breach of Fiduciary Duty, this index
- Multiple claims, 205
- Negligence
 - Claim for damages based on, 203
 - Complaint based on, 204
 - Counterclaim based on, 204
 - Fault, complaint and counterclaim based on, 204
- Owners and occupiers of land, attractive nuisance, 1109
- Preponderance of evidence defined, 202
- Products Liability, this index
- Proximate cause, 503
- Relationship admitted, 208
- Standards of care, varying, 205
- Uninsured or underinsured motorist coverage, 2301 to 2303
- Varying standards of care, 205

BUSINESS EXPECTANCY

- Intentional torts, interference with business expectancy, 403, 404

CANCELLATION

- Contracts, cancellation as defense, 2430
- Franchise Practices Act, damages for cancellation, 2800

CAPACITY OR INCAPACITY

- Comparative fault, representative capacity, 2102

CAPACITY OR INCAPACITY

—Cont'd

Damages, loss of capacity to earn,
2207

CARETAKING

Damages, past and future caretak-
ing expenses, 2209

CARRIERS

Common Carriers, this index

Railroads, this index

CAUSE OF ACTION

Damages, this index

Proximate Cause, this index

CAUTIONARY INSTRUCTION

Additional cautionary instructions,
closing instructions, 3502

Introductory instructions, gener-
ally, 101

Recesses, duty of jury during, 102

Respective duties of judge and
jury, 103

CHANGE

Modification, this index

CHILDREN OR MINORS

Agency, minor driver's parent as
passenger, 706

Anticipating behavior of children,
duty as to, 604

Damages, this index

Destruction of property by minor
as willful or malicious,
liability imposed by statute,
801

Failure to sign license application,
permitting minor under 18 to
drive, 804

Liability imposed by statute

Generally, 801 to 804

Destruction of property by
minor as willful or mali-
cious, 801

Malicious destruction of prop-
erty by minor, 801

Motor vehicles, below

Property, willful or malicious
destruction by minor, 801

CHILDREN OR MINORS

—Cont'd

Liability imposed by statute

—Cont'd

Willful destruction of property
by minor, 801

Licenses, Motor vehicles, below

Malicious destruction of property
by minor, liability imposed
by statute, 801

Motor vehicles

Agency, minor driver's parent
as passenger, 706

Failure to sign license applica-
tion, permitting minor
under 18 to drive, 804

Permitting minor to drive,
liability imposed by stat-
ute, 802, 804

Responsibility of person signing
application of child for
operator's license, liability
imposed by statute, 803

Negligence

Anticipating behavior of chil-
dren, duty as to, 604

Responsibility to control minor
children, 605

Ordinary care of minors, 304

Passenger, minor driver's parent
as, 706

Permitting minor to drive, liability
imposed by statute, 802, 804

Property, willful or malicious
destruction by minor, 801

Responsibility

Motor vehicles, responsibility
of person signing applica-
tion of child for operator's
license, 803

Negligence, responsibility to
control minor children, 605

Signatures, Motor vehicles, above
Unmarried minor, damages for
wrongful death, 2217

Willful destruction of property by
minor, liability imposed by
statute, 801

CIRCUMSTANTIAL EVIDENCE

Introductory instructions, 108

CLAIMS

- Damages, this index
- Intentional Torts, this index
- Introductory instructions, separate rights of two or more claimants, **109**
- Malpractice and Breach of Fiduciary Duty, this index
- Products liability, claims involving two or more theories of liability, **1013**

CLOSING INSTRUCTIONS

- Generally, **3501 to 3503**
- Additional cautionary instructions, **3502**
- Deadlocked jury, **3503**

CLOTHING

- Damages, **2229**

COLLATERAL SOURCES

- Damages, **2215**

COLLISIONS

- Motor Vehicles, this index

COMMON CARRIERS

- Generally, **1701, 1702**
- Passengers, duty to, **1701, 1702**
- Third persons, duty to protect passengers from, **1702**

COMMON LAW

- Rules of the Road, this index

COMPARATIVE FAULT

- Animals, liability for dangerous animals, **1604**
- Complaint, **2103 to 2107**
- Counterclaims, **2101, 2103 to 2107**
- Defenses, products liability, **1014**
- General verdict
 - Generally, **2101 to 2110**
 - Complaint, **2103 to 2107**
 - Counterclaims, **2101, 2103 to 2107**
 - Imputed negligence, **2108 to 2110**
 - Joint tortfeasors, **2108, 2110**
 - Multiple claims, **2108 to 2110**

COMPARATIVE FAULT—Cont'd

- General verdict—Cont'd
 - Principal and agent
 - Complaints, **2104, 2106, 2107**
 - Counterclaims, **2104**
 - Representative capacity, plaintiff suing in, **2102**
- Imputed negligence, **2108 to 2110**
- Joint tortfeasors, **2108, 2110**
- Multiple claims, **2108 to 2110**
- Principal and agent. General verdict, above
- Products liability, evidence, **1014**
- Representative capacity, **2102**
- Verdict. General verdict, above

COMPETENCY OR INCOMPETENCY

- Employer's liability for employment of incompetent independent contractor, **709**

COMPLIANCE

- National Electrical Safety Code, duty to comply with, **1403**

COMPOSITION

- Contracts, more than one document, **2420**

CONCEALMENT

- Deceptive trade practices, damages based on concealment of material fact, **2902**
- Fraudulent concealment to suspend running of statute of limitations, **211**

CONCERT, ACTING IN

- Employment, **713**

CONCURRING PROXIMATE CAUSE

- Generally, **501, 502**

CONDEMNATION

- Eminent Domain, this index

CONDUCT

- Imputed Conduct, this index
- Negligence, duty to anticipate behavior of children, **604**

CONDUCT—Cont'd

Willful or Wanton Conduct, this index

CONFIRMATION

UCC sales contracts, additional terms in confirmation, 2505

CONSENT OR APPROVAL

Informed consent. Malpractice and Breach of Fiduciary Duty, this index

Invasion of privacy, consent as defense, 424

Malpractice and Breach of Fiduciary Duty, this index

Minor permitted to drive, liability imposed by statute, 802, 804

CONSEQUENTIAL DAMAGES

Contracts, 2443

CONSIDERATION

Contracts, consideration defined, 2406

CONSORTIUM, LOSS OF

Damages, 2211

CONSPIRACY, CIVIL

Generally, 714

CONSTRUCTION OR INTERPRETATION

Contracts, this index

CONSTRUCTION WORK

Generally, 1201 to 1208

Architect, standard of care, 1204

Contractor, standard of care, 1203

Definition of habitability, 1208

Duties

Highway contractor, duty to maintain safe passage, 1202

Traveler with knowledge of construction activity, duty of care, 1201

Eminent domain, temporary construction easement, 2010

Engineer, standard of care, 1204

Highway contractor, duty to maintain safe passage, 1202

CONSTRUCTION WORK

—Cont'd

Implied warranties of habitability, sound workmanship, and proper construction

Breach of warranty, generally, 1205

Definition of habitability, 1208

Exclusion or waiver of warranty, 1207

Extension of warranty to subsequent purchaser, 1206

Notice or knowledge, traveler with knowledge of construction activity, 1201

Standard of care, 1203, 1204

Traveler with knowledge of construction activity, duty of care, 1201

CONTAGIOUS DISEASE

Malpractice and breach of fiduciary duty, duty to prevent spread of contagious disease, 1505

CONTRACTORS

Construction work, standard of care, 1203

CONTRACTS

Generally, 2401 to 2445

Acceptance or rejection

Defenses, waiver of breach by acceptance of benefits, 2437

Offer and acceptance, below

UCC Sales Contracts, this index

Accord and satisfaction as defense, 2431

Ambiguity in language, 2412

Breach of contract, generally, 2401

Cancellation as defense, 2430

Composition, more than one document, 2420

Consequential damages, 2443

Consideration defined, 2406

Construction. Interpretation, below

CONTRACTS—Cont'd

- Counteroffer, 2409
- Course of dealing, interpretation of, 2416, 2418
- Course of performance, interpretation of, 2415
- Custom in the trade, interpretation of, 2417, 2418
- Damages
 - Generally, 2442, 2443
 - Consequential damages, 2443
 - Tacit agreement rule, 2443
- Defenses
 - Generally, 2430 to 2441
 - Acceptance of benefits, waiver of breach by, 2437
 - Accord and satisfaction, 2431
 - Cancellation, 2430
 - Disabling illness, 2440
 - Duress, 2435
 - Estoppel: Waiver or estoppel, below
 - Fraud in inducement, 2433
 - Impossibility of performance, 2439
 - Inducement, fraud in, 2433
 - Performance, prevention of, 2441
 - Prevention of performance, 2441
 - Release, 2432
 - Undue influence, 2434
- Definitions
 - Consideration, 2406
 - Offer and acceptance, 2405
 - Reasonably certain, 2407
- Disabling illness as defense, 2440
- Disputes, existence of contract, 2403
- Drafting contract, construction against one who drafted contract, 2424
- Duration of offer, 2408
- Duress as defense, 2435
- Estoppel. Waiver or estoppel, below
- Existence of contract
 - Generally, 2403
 - UCC sales contracts, 2502

CONTRACTS—Cont'd

- Express contract, 2404
- Express terms, interpretation of, 2418
- Fair dealing, implied covenant of, 2426
- Formation of contract
 - Generally, 2401 to 2411
 - Acceptance. Offer and acceptance, below
 - Consideration defined, 2406
 - Counteroffer, 2409
 - Definitions
 - Consideration, 2406
 - Offer and acceptance, 2405
 - Reasonably certain, 2407
 - Disputes, existence of contract, 2403
 - Duration of offer, 2408
 - Existence of contract, 2403
 - Express contract, 2404
 - Implied contract, 2404
 - Offer and acceptance, below
 - Reasonably certain defined, 2407
 - Third party beneficiary statute, 2410, 2411
 - UCC sales contracts, 2501
- Fraud in inducement as defense, 2433
- General provisions, interpretation of, 2421
- Good faith, implied covenant of, 2426
- Illustrative sets of instructions, basic contract dispute, Chapter 36.IV
- Implied contract, 2404
- Implied covenant of good faith and fair dealing, 2426
- Impossibility of performance as defense, 2439
- Inducement, fraud in inducement as defense, 2433
- Interference with contractual relationship, intentional torts, 403, 404
- Interpretation
 - Generally, 2412 to 2424

CONTRACTS—Cont'd

Interpretation—Cont'd

Ambiguity in language, 2412

Composition, more than one document, 2420

Construction against one who drafted contract, 2424

Course of dealing, 2416, 2418

Course of performance, 2415

Custom in the trade, 2417, 2418

Drafting, construction against one who drafted contract, 2424

Express terms, 2418

General provisions, 2421

Language of contract interpreted as whole, 2419

Ordinary meaning, 2413

Performance, course of, 2415

Preprinted forms, written or typewritten provisions control provisions of, 2422

Reasonable time, 2423

Specific and general provisions, 2421

Time not expressed, 2423

Typewritten provisions control provisions of preprinted forms, 2422

Whole, language of contract interpreted as, 2419

Words or phrases of particular trade or occupation, 2414

Written provisions control provisions of preprinted forms, 2422

Language of contract interpreted as whole, 2419

Modification

Generally, 2425

UCC Sales Contracts, this index

Offer and acceptance

Counteroffer, 2409

Defined, 2405

Duration of offer, 2408

Formation of contract

Counteroffer, 2409

Defined, 2405

Duration of offer, 2408

CONTRACTS—Cont'd

Ordinary meaning, 2413

Performance or breach

Generally, 2425 to 2429

Defenses, prevention of performance, 2441

Good faith and fair dealing, implied covenant of, 2426

Implied covenant of good faith and fair dealing, 2426

Interpretation, course of performance, 2415

Modification of contract, 2425

Substantial performance, 2428

Tender, 2428

UCC sales contracts, course of performance, 2511

Preprinted forms, written or typewritten provisions control provisions of, 2422

Prevention of performance as defense, 2441

Promissory estoppel, 2444, 2445

Reasonable time, interpretation of, 2423

Reasonably certain defined, 2407

Rejection. Acceptance or rejection, above

Release as defense, 2432

Restitution implied in fact, 2445

Specific and general provisions, interpretation of, 2421

Substantial performance, 2428

Tacit agreement rule, damages, 2443

Tender, 2428

Third party beneficiary statute, 2410, 2411

Time

Duration of offer, 2408

Interpretation, time not expressed, 2423

Reasonable time, interpretation of, 2423

Typewritten provisions control provisions of preprinted forms, 2422

UCC Sales Contracts, this index

Undue influence as defense, 2434

INDEX

CONTRACTS—Cont'd

- Unjust enrichment, **2445**
- Waiver or estoppel
 - Generally, **2436 to 2438**
 - Acceptance of benefits, waiver of breach by, **2437**
- Whole, language of contract interpreted as, **2419**
- Words or phrases of particular trade or occupation, interpretation of, **2414**
- Written provisions control provisions of preprinted forms, **2422**

CONTROL

- Rules of the road, common law rules of the road, **901**

CONVERSION

- Damages based upon conversion of personal property, claim for, **425**

COSTS AND EXPENSES

- Damages, this index

COUNTEROFFER

- Contracts, **2409**

COURSE OF DEALING

- Contracts, interpretation of course of dealing, **2416, 2418**
- UCC Sales Contracts, this index

COURSE OF PERFORMANCE

- Interpretation of course of performance, **2415**
- UCC sales contracts, **2511**

CREDIBILITY OF WITNESSES

- Introductory instructions, **105**

CROPS

- Damage to crops, **2226**

CROSSINGS

- Railroads, this index

CUSTODY AND CUSTODIANS

- Animals, duty of custodian, **1601**

CUSTOMS IN THE TRADE

- Contracts, interpretation of custom in the trade, **2417, 2418**

DAMAGE TO PROPERTY

- Damages, this index

DAMAGES

- Generally, **2201 to 2231**
- Abuse of process, claim for damages based upon, **416**
- Aggravation of pre-existing condition, **2203**
- Assault and battery, claim for damages based upon, **417, 418**
- Bank Deposits and Collections, this index
- Burden of proof, claim for damages based on negligence, **203**
- Capacity to earn, loss of, **2207**
- Caretaking expenses, past and future, **2209**
- Cause of action
 - Parent and child, **2212 to 2214**
 - Wrongful death, **2216**
- Children. Parent and child, below
- Clothing or personal effects, **2229**
- Collateral sources, **2215**
- Consortium, loss of, **2211**
- Contracts, this index
- Costs. Expenses, below
- Crops, damage to, **2226**
- Damage to property. Property damage, below
- Death. Wrongful death, below
- Deceptive trade practices, **2900, 2902**
- Defamation, claim for damages based on, **407 to 410**
- Definitions
 - Fair market value, **2221**
 - Present value, **2220**
- Destruction of improvements on realty, **2225**
- Disfigurement, results of injury, **2208**
- Duration of injury, **2202**

DAMAGES—Cont'd

Earnings

Capacity to earn, loss of, 2207

Past and future loss of, 2206

Eminent Domain, this index

Exemplary damages, 2218, 2218A

Expenses

Caretaking expenses, past and future, 2209

Medical expenses, past and future, 2204

Extent of injury, 2202

Fair market value defined, 2221

Franchise Practices Act, this index

Future matters

Caretaking expenses, 2209

Earnings or profits, loss of, 2206

Medical expenses, 2204

Mental anguish, 2205

Pain and suffering, 2205

Profits, loss of, 2206

General instruction, 2201

Improvements to real property, destruction of, 2225

Intentional Torts, this index

Invasion of privacy, claim for damages based upon, 420 to 423

Loss of consortium, 2211

Malicious prosecution, 413, 2231

Malpractice and Breach of Fiduciary Duty, this index

Measure of damages

Securities fraud, 2706

Trade secrets, misappropriation of, 2604

Medical expenses, past and future, 2204

Mental anguish, past and future, 2205

Mitigation of damages, real and personal property, 2230

Mortality tables, purpose of, 2219

Nature of injury, 2202

No salvage, 2228

Owners and occupiers of land, off-premises injuries, 1110

DAMAGES—Cont'd

Pain and suffering, past and future, 2205

Parent and child

Cause of action, 2212 to 2214

Wrongful death, unmarried minor, 2217

Past

Caretaking expenses, 2209

Earnings, loss of, 2206

Medical expenses, 2204

Mental anguish, 2205

Pain and suffering, 2205

Profits, loss of, 2206

Permanency

Injury, permanency of, 2202

Real property, 2223

Personal property

Generally, 2227 to 2230

Clothing or personal effects, 2229

Conversion of personal property, claim for damages based upon, 425

General instruction, 2222

Mitigation of damages, 2230

No salvage, 2228

Salvage, 2228

Pre-existing condition, aggravation of, 2203

Present value defined, 2220

Prior matters. Past, above

Profits, past and future loss of, 2206

Property damage

Generally, 2222 to 2230

Personal property, above

Real property, below

Punitive damages, 2218, 2218A

Real property

Crops, damage to, 2226

Destruction of improvements on realty, 2225

General instruction, 2222

Improvements, destruction of, 2225

Mitigation of damages, 2230

Permanency, 2223

DAMAGES—Cont'd

- Real property—Cont'd
 - Repairable, 2224
 - Temporary, 2224
- Repairs, real property, 2224
- Salvage, personal property, 2228
- Scars, results of injury, 2208
- Securities Fraud, this index
- Temporary damage to real property, 2224
- Time
 - Duration of injury, 2202
 - Future matters, above
 - Prior matters. Past, above
 - Real property, temporary damage to, 2224
- Trade secrets, misappropriation of, 2600, 2604
- UCC Sales Contracts, this index
- Unmarried minor, wrongful death, 2217
- Value or valuation. Definitions, above
- Vehicle, damage to, 2210
- Visible results of injury, 2208
- Whistle-blowers, 3106
- Wrongful death
 - Cause of action, 2216
 - Unmarried minor, 2217

DANGER OR DANGEROUS CONDITIONS

- Absolute liability, owners and occupiers of land, 1108
- Animals, this index
- Electricity, duty to warn of danger, 1404
- Owners and occupiers of land, ultrahazardous activities, 1108
- Railroads, duty to warn of abnormally dangerous crossing, 1805
- Unreasonably dangerous defined, 1017

DEADLOCKED JURY

- Closing instructions, 3503

DEATH

- Damages, this index
- Mortality tables, 2219

DECEPTIVE TRADE PRACTICES

- Generally, 2900 to 2903
- Concealment of material fact, damages based on, 2902
- Damages, 2900, 2902
- Definitions, 2901
- False pretense, damages based on, 2902
- Imputed liability, 2903
- Omission of material fact, damages based on, 2902
- Sale transactions, damages, 2902
- Suppression of material fact, damages based on, 2902

DEFAMATION

- Generally, 407 to 412
- Claim for damages based on, 407 to 410
- Damages, claim for based on defamation, 407 to 410
- Defamatory defined, 411
- Definitions
 - Defamatory, 411
 - Published and publication, 412
- Meetings, claim for damages based on defamation, 410
- Official proceeding report, claim for damages based on defamation, 410
- Private figure, claim for damages based on defamation, 407, 410
- Public figures, claim for damages based upon defamation, 408, 409
- Public meeting report, claim for damages based on defamation, 410
- Published and publication defined, 412
- Qualified privilege, claim for damages based on defamation, 410

DEFAMATION—Cont'd

Report of official proceeding or public meeting, claim for damages based on defamation, **410**

DEFAMATORY

Defined, **411**

DEFENSES

Affirmative Defense, this index

Animals, defenses, liability for dangerous, **1603**

Bank deposits and collections, failure to promptly notify, **3003**

Burden of proof, affirmative defenses, **206**

Construction work, waiver of implied warranties of habitability, sound workmanship, and proper construction, **1207**

Contracts, this index

Disabling illness as defense, contracts, **2440**

Invasion of privacy, defense of consent, **424**

Malicious prosecution, advice of counsel, **415**

Negligence, this index

Products Liability, this index

Securities fraud, **2702**

UCC sales contracts, exclusion or modification of implied warranties, **2514**

Whistle-blowers, **3105**

DEFINITIONS

Agency, **701, 702**

Assumption of risk, **306**

Bank Deposits and Collections, this index

Burden of Proof, this index

Contracts, this index

Damages, this index

Deceptive trade practices, **2901**

Defamation, this index

Eminent Domain, this index

Employment, **701, 702, 712**

Fair market value, **2006, 2221**

Fault, **301**

DEFINITIONS—Cont'd

Fiduciary duty, **1513**

Franchise Practices Act, this index

Good Faith, this index

Habitability, **1208**

Intentional Torts, this index

Intoxication, **606**

Negligence, **302**

Ordinary care, **303**

Partnership, **710**

Probable cause, **414**

Products Liability, this index

Proximate cause, **501, 503**

Right of way, **909**

Securities fraud, **2703**

Trade Secrets, this index

UCC Sales Contracts, this index

Willful or wanton conduct, **1101**

DELIVERY

UCC Sales Contracts, this index

DENTISTS

Malpractice and Breach of Fiduciary Duty, this index

DESTRUCTION

Children or minors, destruction of property by minor as willful or malicious, **801**

Damages, destruction of improvements on realty, **2225**

Introductory instructions, destruction of evidence as intentional, **106**

DESTRUCTION OF EVIDENCE

Introductory instructions, destruction of evidence as intentional, **106**

DEVIATION

Agency, deviation from route, **704**

DISABLING ILLNESS

Contracts, disabling illness as defense, **2440**

DISCLOSURE

Invasion of privacy by public disclosure of private facts,

DISCLOSURE—Cont'd

- claim for damages based upon, **422**

DISEASES

- Malpractice and breach of fiduciary duty, duty to prevent spread of contagious diseases, **1505**

DISFIGUREMENT

- Damages, results of injury, **2208**

DISPUTES

- Contract existence, **2403**

DISTINCTIONS

- Contracts, interpretation of words or phrases of particular trade or occupation, **2414**
- Definitions, this index
- Owners and occupiers of land, distinction between trespasser or licensee and invitee, **1107**

DRAFTING CONTRACT

- Construction against one who drafted contract, **2424**

DRAM SHOP LIABILITY

- Intoxicated persons, sales to, **1902**
- Minors, sales to, **1901**

DURATION

- Contracts, **2408**
- Contracts, lapse of offer, **2504**
- Damages, duration of injury, **2202**
- Offer, **2408, 2504**
- Statute of limitations, duration of suspension of running of, **212**
- UCC sales contracts, lapse of offer, **2504**

DURESS

- Contracts, duress as defense, **2435**

DUTIES

- Animals, duty of owner or custodian, **1601**
- Children, duty as to anticipating behavior of, **604**
- Construction Work, this index
- Electricity, this index

DUTIES—Cont'd

- Malpractice and Breach of Fiduciary Duty, this index
- Ordinary care, duty to use, **305**
- Owners and Occupiers of Land, this index
- Railroads, this index
- Warning Duty, this index,

EARNINGS

- Damages, this index

EASEMENTS

- Eminent Domain, this index

ELECTRICITY

- Generally, **1401 to 1405**
- Compliance, duty to comply with National Electrical Safety Code, **1403**
- Danger, duty to warn of, **1404**
- Duties
 - Inspection duties, **1401**
 - Installation duties, **1401**
 - Insulation duties, **1402**
 - Isolation of electric wires, **1402**
 - National Electrical Safety Code, duty to comply with, **1403**
 - Repair duties, **1401**
 - Warning of danger, **1404**
- Inspection duties, **1401**
- Installation duties, **1401**
- Insulation duties, **1402**
- Isolation of electric wires, duty as to, **1402**
- National Electrical Safety Code, duty to comply with, **1403**
- Repair duties, **1401**
- Res ipsa loquitur, **1405**
- Warning of danger duty, **1404**

EMERGENCY VEHICLES

- Rules of the Road, this index

EMINENT DOMAIN

- Burden of proof, **2001**
- Comparable properties, sales and leases of, **2011**
- Complete taking, damages, **2005**
- Damages
 - Complete taking, **2005**

EMINENT DOMAIN—Cont'd

- Damages—Cont'd
 - Easements, 2004
 - Partial taking
 - By entity other than sovereign, 2003, 2004
 - By sovereign, 2002
 - Temporary construction easement, 2010
- Definitions
 - Fair market value, 2006
 - Highest and best use, 2007
- Easements
 - Damages, 2004
 - Temporary construction easement, 2010
- Evidence
 - Burden of proof, 2001
 - Comparable properties, sales and leases of, 2011
 - Purchase price of property taken, 2012
- Fair market value
 - Definition, 2006
 - Factors to consider, 2008
 - Owner's testimony, 2009
- Highest and best use, definition, 2007
- Nature of action, 2001
- Owner's testimony, fair market value, 2009
- Partial taking
 - By entity other than sovereign, 2003, 2004
 - By sovereign, 2002
- Purchase price of property taken, 2012
- Temporary construction easement, 2010

EMPLOYMENT

- Generally, 701 to 713
- Acting in concert, 713
- Adverse action defined, 3102
- Agency, this index
- Arkansas Whistle-blower Act, 3101
- At-will doctrine, 3107
- Authority, scope of, 702

EMPLOYMENT—Cont'd

- Borrowed servant, 707A
- Concert, acting in, 713
- Conspiracy, civil, 714
- Damages, 3106
- Defense, 3105
- Definitions
 - Adverse action, 3102
 - Employee, 701
 - Good faith, 3103
 - Joint enterprise, 712
 - Scope of employment, 702
 - Waste, 3104
- Good faith defined, 3103
- Handbook exception to at-will doctrine, 3107
- Incompetent independent contractor, liability of employer for employment of, 709
- Independent Contractors, this index
- Joint enterprise, definition and effect, 712
- Negligent hiring, supervision, or retention of employee, liability of employer for, 709A
- Partnership, this index
- Scope of authority, 702
- Scope of employment, 702, 703
- Vehicle of employer, employee driving, 703
- Waste defined, 3104
- Whistle-blowers, 3101 to 3107
- Wrongful termination, 3107

ENGINEERS AND ENGINEERING

- Construction work, standard of care, 1204

ENTRUSTMENT

- Negligent entrustment, 608

EQUIPMENT

- Machinery and Equipment, this index

ESTOPPEL

- Waiver or Estoppel, this index

INDEX

EVIDENCE

- Burden of Proof, this index
- Circumstantial evidence, 108
- Comparative fault, 1014
- Eminent Domain, this index
- Introductory Instructions, this index
- Negligence, this index
- Ordinances, this index
- Presumptions. Burden of Proof, this index
- Rules of the road, violation of statute or ordinance as evidence of negligence, 903
- UCC sales contracts, evidence of market price, 2528

EXCLUSION

- UCC sales contracts, exclusion of implied warranties as defense, 2514

EXEMPLARY DAMAGES

- Generally, 2218, 2218A

EXISTENCE

- Contracts, this index
- Partnership, tests of existence of relationship, 711

EXPENSES

- Damages, this index

EXPERIENCES

- Introductory instructions, personal observations and experiences, 104

EXPERT WITNESSES

- Introductory instructions, 107

EXPLOSIVES

- Negligence in use of, 1301

EXPRESS CONTRACTS

- Generally, 2404

EXPRESS TERMS

- Interpretation of, 2418

EXPRESS WARRANTIES

- Products liability, breach of express warranty, 1012
- UCC sales contracts, 2508

EXTENT OF INJURY

- Damages, 2202

FAIR DEALING

- Contracts, implied covenant of fair dealing, 2426

FAIR MARKET VALUE

- Defined, 2006, 2221
- Eminent Domain, this index

FALSE LIGHT

- Invasion of privacy, claim for damages based upon false light, 423

FALSE PRETENSE

- Deceptive trade practices, damages based on false pretense, 2902

FAULT

- Defined, 301
- Nonparty fault, 307

FIDUCIARIES

- Malpractice and Breach of Fiduciary Duty, this index

FIRST PARTY INSURANCE (MEDPAY DENIAL)

- Illustrative sets of instructions, Chapter 36.V

FITNESS FOR PARTICULAR PURPOSE

- Products liability, implied warranty of fitness for particular purpose, 1011
- UCC sales contracts, implied warranty of fitness for particular purpose, 2513

FOOD

- Products liability, food vendor's duty, 1007

FOREIGN OBJECT OR SUBSTANCE

- Owners and occupiers of land, duty owed to admitted invitee, 1106

FORGERY

Bank deposits and collections;
negligence contributing to
forged signature, **3006**

FORMATION OF CONTRACT

Contracts, this index

FORWARD VEHICLE

Rules of the road, superior right of
forward vehicle, **902**

FOUR-WAY STOP

INTERSECTIONS

Rules of the road, right of way,
906

FRANCHISE

Defined, **2801**

FRANCHISE PRACTICES ACT

Generally, **2800 to 2807**
Assignment defined, **2807**
Cancellation, damages for, **2800**
Damages

Cancellation, damages for, **2800**

Misleading or fraudulent
schemes in sale or
purchase of franchise,
2806

Renewal failure, damages for,
2800

Termination, damages for, **2800**

Unlawful practices of franchi-
sors, **2805**

Definitions

Assignment, **2807**

Franchise, **2801**

Franchisee, **2803**

Franchisor, **2803**

Good cause, **2802**

Good faith, **2804**

Person, **2803**

Sales, **2807**

Transfer, **2807**

Franchise defined, **2801**

Franchisee defined, **2803**

Franchisor defined, **2803**

Fraudulent schemes in sale or
purchase of franchise, dam-
ages for, **2806**

FRANCHISE PRACTICES ACT

—Cont'd

Good cause defined, **2802**

Good faith defined, **2804**

Misleading or fraudulent schemes
in sale or purchase of
franchise, damages for, **2806**

Person defined, **2803**

Renewal failure, damages for,
2800

Sale

Damages based on misleading
or fraudulent schemes in
sale or purchase of
franchise, **2806**

Defined, **2807**

Termination, damages for, **2800**

Transfer defined, **2807**

Unlawful practices of franchisors,
damages for, **2805**

FRANCHISEE

Defined, **2803**

FRANCHISOR

Defined, **2803**

FRAUD AND DECEIT

Concealment, this index

Contracts, fraud in inducement as
defense, **2433**

Deceptive Trade Practices, this
index

Franchise Practices Act, damages
for fraudulent schemes in sale
or purchase of franchise,
2806

Intentional torts, claim for dam-
ages based on fraud and
deceit, **402**

Securities Fraud, this index

Statute of limitations, fraudulent
concealment to suspend run-
ning of, **211**

Trade practices, Deceptive Trade
Practices, this index

FRAUD IN INDUCEMENT

Contracts, fraud in inducement as
defense, **2433**

INDEX

FRAUDULENT CONCEALMENT

Statute of limitations, fraudulent concealment to suspend running of, **211**

FUTURE MATTERS

Damages, this index

GENERAL INSTRUCTION

Damages, **2201**

GENERAL PROVISIONS

Contracts, interpretation of general provisions, **2421**

GENERAL VERDICT

Comparative Fault, this index
Concurring proximate cause, **502**
Principal and agent. Comparative Fault, this index
Proximate cause, **502**

GOOD CAUSE

Franchise Practices Act, good cause defined, **2802**

GOOD FAITH

Bank deposits and collections, **3005**
Contracts, implied covenant of good faith, **2426**
Definitions
Good faith, **2804, 3005, 3103**
Franchise Practices Act, good faith defined, **2804**
Insurance, tort of bad faith by insurance company, **2304**
Intentional Torts, this index
Whistle-blowers, good faith defined, **3103**

GOODS

UCC sales contracts, acceptance of goods, **2517**

GRADE CROSSING

Railroads, this index

HABITABILITY

Implied warranty of habitability.
Construction Work, this index

HIGHWAYS, STREETS, AND BRIDGES

Construction work, highway contractor's duty to maintain safe passage, **1202**
Motor Vehicles, this index
Rules of the Road, this index

HOSPITALS

Malpractice and breach of fiduciary duty, **1504**

ILLNESS

Sickness or Illness, this index

ILLUSTRATIVE SETS OF INSTRUCTIONS

Contract dispute, **Chapter 36.IV**
First party insurance (MedPay denial), **Chapter 36.V**
Malpractice, **Chapter 36.III**
Multiparty automobile collision, **Chapter 36.II**
Right-angle automobile collision, **Chapter 36.I**

IMPLIED CONTRACT

Generally, **2404**

IMPLIED COVENANT

Contracts, implied covenant of good faith and fair dealing, **2426**

IMPLIED WARRANTY

Construction Work, this index
Fitness for Particular Purpose, this index
Habitability, sound workmanship, and proper construction.
Construction Work, this index
Merchantability, this index
Products Liability, this index
UCC Sales Contracts, this index

IMPOSSIBILITY OF PERFORMANCE

Contracts, impossibility of performance as defense, **2439**

IMPROPER DELIVERY

UCC sales contracts, buyer's rights on improper delivery, 2515

IMPROPRIETY

Interference with contractual relationship or business expectancy, 404

IMPROVEMENTS

Damages for destruction to real property improvements, 2225

IMPUTED CONDUCT

Burden of proof, 207, 208

Independent contractors, 708

Malpractice and breach of fiduciary duty, 1503

IMPUTED LIABILITY

Deceptive trade practices, 2903

Securities fraud, 2704, 2705

INCIDENTAL DAMAGES

UCC sales contracts, 2522, 2527

INCOMPETENCY

Competency or Incompetency, this index

INDEPENDENT CONTRACTORS

Generally, 707 to 709

Burden of proof, 209

Imputed conduct, 708

Incompetent independent contractor, liability of employer for employment of, 709

Inherently dangerous work, 708

INDUCEMENT

Contracts, fraud in inducement as defense, 2433

INFANTS

Children or Minors, this index

INFORMED CONSENT

Malpractice and Breach of Fiduciary Duty, this index

INFRINGEMENT

UCC sales contracts, implied warranty against infringements, 2512

INHERENTLY DANGEROUS WORK

Independent contractors, 708

INSPECTION AND INSPECTORS

Electricity, inspection duties, 1401

Products liability, inspection duty of vendor, 1006

Safety Appliance and Boiler

Inspection Acts, Chapter 20

INSTALLATION

Electricity, installation duties, 1401

INSULATION

Electricity, insulation duties, 1402

INSURANCE

Generally, 2301 to 2305

Automobile insurance. Uninsured

Motorist Coverage, this index

Bad faith by insurance company, 2304

Burden of proof

Tort of bad faith by insurance company, 2304

Uninsured or underinsured motorist coverage, 2301 to 2303

Valued policy law, claim for policy limit under, 2305

Illustrative sets of instructions, Chapter 36.V

Motor vehicles. Uninsured Motorist Coverage, this index

Tort of bad faith by insurance company, 2304

Uninsured or Underinsured Motorist Coverage, this index

Valued policy law, claim for policy limit under, 2305

INTENT

Evidence, intentional destruction of, 106

INTENT—Cont'd

Torts. Intentional Torts, this index

INTENTIONAL TORTS

Generally, 401 to 425

Abuse of Process, this index

Assault and Battery, this index

Battery. Assault and Battery, this index

Burden of proof

Abuse of process, 416

Assault, 417

Battery, 418

Business expectancy, interference with, 403

Contractual relationship, interference with, 403

Damages based upon intentional tort, generally, 419

Deceit, claim for damages based on, 402

Definition, interference with contractual relationship or business expectancy, 404

Fraud and deceit, claim for damages based on, 402

Impropriety, interference with contractual relationship or business expectancy, 404

Interference with contractual relationship or business expectancy, 403, 404

Malicious prosecution, 413

Outrage, 401

Business expectancy, interference with, 403, 404

Claim for damages. Damages, below

Contractual relationship, interference with, 403, 404

Conversion of personal property, claim for damages based upon, 425

Damages

Abuse of process, 416

Actual damages, 419

Assault, 417

Battery, 418

Burden of proof, above

INTENTIONAL TORTS—Cont'd

Damages—Cont'd

Conversion of personal property, 425

Conversion of personal property, claim for damages based upon, 425

Defamation, 407, 408, 409, 410

Invasion of privacy, 420, 421, 422, 423

Malicious prosecution, 413

Defamation, this index

Definitions

Defamatory, 411

Improper, 404

Interference with contractual relationship or business expectancy, 404

Probable cause, 414

Published and publication, 412

Fraud and deceit, claim for damages based on, 402

Impropriety, interference with contractual relationship or business expectancy, 404

Interference with contractual relationship or business expectancy, 403, 404

Invasion of Privacy, this index

Malicious Prosecution, this index

Outrage, burden of proof, 401

Personal property, claim for damages based upon conversion of, 425

Privacy. Invasion of Privacy, this index

INTERFERENCE

Intentional torts, interference with contractual relationship or business expectancy, 403, 404

INTERPRETERS

Introductory instructions, 111

INTERROGATORIES

Multiple defendants, nonparties involved, 307A

Submission of case on interrogatories, 201

INTERSECTIONS

Right of Way, this index

INTERVENTION

Proximate cause, intervening proximate cause, 503

INTOXICATION

Definition, 606
Dram Shop Liability, this index
Negligence
Generally, 607
Definition, 606

INTRODUCTORY INSTRUCTIONS

Cautionary Instruction, this index
Circumstantial evidence, 108
Claimants, separate rights of two or more, 109
Credibility of witnesses, 105
Defendants, separate rights of two or more, 110
Destruction of evidence as intentional, 106
Evidence
Circumstantial evidence, 108
Intentional destruction or suppression of, 106
Experiences, personal observations and, 104
Expert witnesses, 107
Intentional destruction of evidence, 106
Interpreters, 111
Judge, respective duties of, 103
Observations, personal experiences and, 104
Overview of the trial, 101A
Personal observations and experiences, 104
Recesses, duty of jury during, 102
Respective duties of judge and jury, 103
Separate rights of two or more claimants or defendants, 109, 110
Suppression of evidence, 106
Witnesses, this index

INVASION OF PRIVACY

Generally, 420 to 424
Appropriation, claim for damages based upon invasion of privacy by, 421
Claim for damages based upon invasion of privacy, 420 to 423
Consent as defense, 424
Damages, claim for damages based upon invasion of privacy, 420 to 423
Defense of consent, 424
Disclosure, claim for damages based upon invasion of privacy by public disclosure of private facts, 422
False light invasion of privacy, claim for damages based upon, 423
Private facts, claim for damages based upon invasion of privacy by public disclosure of, 422
Public disclosure of private facts, claim for damages based upon invasion of privacy by, 422
Seclusion, claim for damages based upon invasion of privacy by intrusion upon, 420

INVITEE

Owners and Occupiers of Land, this index

ISOLATION

Electric wires, duty as to duty as to isolation of, 1402

JOINT ENTERPRISE

Definition and effect, 712

JUDGES

Introductory instructions, respective duties of judges, 103

LANDLORD AND TENANT

Owners and occupiers of land, landlord's duty of care to

INDEX

LANDLORD AND TENANT

—Cont'd

repair or maintain property,
1105

LANGUAGE

Contract language interpreted as
whole, 2419

LIABILITY

Children or Minors, this index
Concurring proximate cause, 502
Imputed Liability, this index
Proximate cause, concurring, 502
Statutes, generally, 801 to 804
Statutory Liability, this index

LIBEL OR SLANDER

Defamation, this index

LICENSES

Children or Minors, this index
Owners and Occupiers of Land,
this index

LIMITATIONS OR RESTRICTIONS

Statute of Limitations, this index
UCC sales contracts, limitation of
remedies for breach of war-
ranty, 2529

LISTENING DUTY

Railroads, listening duty of motor-
ist at grade crossings, 1804

LOOK AND LISTEN DUTY

Railroads, look and listen duty of
motorist at grade crossings,
1804

LOOKOUT

Railroads, duty to keep lookout,
1802
Rules of the road, common law
rules of the road, 901

LOSS OF CONSORTIUM

Damages, 2211

MACHINERY AND EQUIPMENT

Safety Appliance and Boiler
Inspection Acts, Chapter 20

MAINTENANCE

Repairs, this index

MALICE

Children or minors, malicious
destruction of property by
minor, 801

Prosecution. Malicious Prosecu-
tion, this index

MALICIOUS PROSECUTION

Generally, 413 to 415
Advice of counsel, defense of act-
ing upon, 415
Attorney, defense of acting upon
advice of, 415
Burden of proof, claim for dam-
ages based upon malicious
prosecution, 413
Claim for damages based upon
malicious prosecution, 413
Damages, 413, 2231
Defense, advice of counsel, 415
Definition of probable cause, 414
Probable cause defined, 414

MALPRACTICE AND BREACH OF FIDUCIARY DUTY

Generally, 1501 to 1513
Attorney negligence, 1510, 1511
Burden of proof
Informed consent, claim for
damages based on, 1507
Medical injury, claim for dam-
ages based on, 1506
Claim for damages. Damages,
below
Contagious disease, duty to
prevent spread of, 1505
Damages
Breach of fiduciary duty, claim
for damages based upon,
1512
Informed consent, claim for
damages based on, 1507
Medical injury, claim for dam-
ages based on, 1506
Definition, fiduciary duty, 1513
Dentists
Generally, 1501
Referring dentist, duty of, 1502

MALPRACTICE AND BREACH OF FIDUCIARY DUTY

—Cont'd

Diseases, duty to prevent spread of contagious, **1505**

Hospital, duty of, **1504**

Illustrative sets of instructions,

Chapter 36.III

Imputed conduct, **1503**

Informed consent

Duty to obtain, **1508**

Medical injury, claim for damages based on, **1506**

Negligence, claim for damages based on informed consent, **1507**

Proximate cause, **1509**

Medical care or treatment

Generally, **1501**

Claim for damages based on medical injury, **1506**

Contagious disease, duty to prevent spread of, **1505**

Dentists, above

Hospital, duty of, **1504**

Nursing home, duty of, **1504**

Physicians and surgeons, below

Sanitarium, duty of, **1504**

Negligence

Attorney negligence, **1510**, **1511**

Informed consent, claim for damages based on, **1507**

Nursing home, duty of, **1504**

Physicians and surgeons

Generally, **1501**

Referring physician and surgeon, duty of, **1502**

Proximate cause

Attorney negligence, **1511**

Informed consent, **1509**

Referring physician, surgeons or dentist, duty of, **1502**

Relationship undisputed, definition of fiduciary duty, **1513**

Sanitarium, duty of, **1504**

Undisputed relationship, definition of fiduciary duty, **1513**

MANUFACTURERS AND MANUFACTURING

Products Liability, this index

MARKETS AND MARKETING

Fair market value defined, **2221**

UCC sales contracts, evidence of market price, **2528**

MATERIAL FACT

Deceptive trade practices, damages based on concealment, suppression, or omission of material fact in sale transaction, **2902**

MEASURE OF DAMAGES

Damages, this index

MEDICAL CARE OR TREATMENT

Malpractice and Breach of Fiduciary Duty, this index

MEDICAL EXPENSES

Damages for medical expenses past and future, **2204**

MEETINGS

Defamation, claim for damages based on, **410**

MENTAL ANGUISH

Damages for mental anguish past and future, **2205**

MERCHANT

Defined, **2506**

MERCHANTABILITY

Products liability, implied warranty of merchantability, **1010**

UCC sales contracts, implied warranty of merchantability, **2509**

MINORS

Children or Minors, this index

MISAPPROPRIATION

Trade Secrets, this index

INDEX

MISLEADING OR FRAUDULENT SCHEMES

Franchise Practices Act, damages for misleading or fraudulent schemes in sale or purchase of franchise, **2806**

MITIGATION OF DAMAGES

Personal injuries, **2214**
Real and personal property, **2230**

MODIFICATION

Contracts, this index

MORTALITY TABLES

Damages, purpose of mortality tables, **2219**

MOTOR VEHICLES

Agency, this index
Automobile insurance. Uninsured Motorist Coverage, this index
Children or Minors, this index
Collisions
 Multiparty automobile collision, illustrative sets of instructions, **Chapter 36.II**
 Right-angle automobile collision, illustrative sets of instructions, **Chapter 36.I**
Damage to vehicle, **2210**
Emergency vehicles. Rules of the Road, this index
Employee driving vehicle of employer, **703**
Forward vehicle, superior right of, **902**
Insurance. Uninsured Motorist Coverage, this index
Multiparty automobile collision, illustrative sets of instructions, **Chapter 36.II**
Passengers, this index
Right-angle automobile collision, illustrative sets of instructions, **Chapter 36.I**
Rules of the Road, this index
Uninsured Motorist Coverage, this index

MULTIPARTIES

Automobile collision, illustrative sets of instructions, **Chapter 36.II**
Negligence, fault and ordinary care, illustrative interrogatories, **307A**

MULTIPLE CLAIMS

Burden of proof, **205**

NATIONAL ELECTRICAL SAFETY CODE

Duty to comply with, **1403**

NEGLIGENCE

Generally, **601 to 612**
Act of God, **611**
Addition or additional matters, res ipsa loquitur in addition to, specified acts of negligence, **610**
Alcoholic beverages. Intoxication, this index
Anticipation, duty to anticipate behavior of children, **604**
Attempted rescue, **612**
Bank deposits and collections, negligence contributing to forged signature or alteration of instrument, **3006**
Behavior of children, duty to anticipate, **604**
Burden of Proof, this index
Children or Minors, this index
Comparative Fault, this index
Defenses, generally, **601 to 612**
Defined, **302**
Definitions, intoxication, **606**
Employment, negligent hiring, supervision, or retention of employee, **709A**
Entrustment, negligent, **608**
Evidence of negligence
 Rules of the road, violation of statute or ordinance as evidence of negligence, **903**
 Violation of statute or ordinance as, **601**
Explosives, use of, **1301**
Intoxication, this index

NEGLIGENCE—Cont'd

- Malpractice and Breach of Fiduciary Duty, this index
- Minors, Children or Minors, this index
- ObeY laws, right to assume others will, **602**
- Ordinances, this index
- Ordinary care, right to assume others will use, **602**
- Presumptions, no presumption of fault from happening of injury, **603**
- Products Liability, this index
- Res Ipsa Loquitur, this index
- Rescue attempted, **612**
- Responsibility to control minor children, **605**
- Rules of the road, violation of statute or ordinance as evidence of negligence, **903**
- Statutes, violation of as evidence of negligence, **601**
- Violation of statute or ordinance as evidence of negligence, **601**

NO SALVAGE

- Damages, **2228**

NONACCEPTANCE

- UCC sales contracts, damages for nonacceptance by buyer, **2524**

NONDELIVERY

- UCC sales contracts, damages for nondelivery, **2519**

NOTICE OR KNOWLEDGE

- Bank deposits and collections, failure to promptly notify, **3003**
- Construction activity, traveler with knowledge of, **1201**

NUISANCES

- Owners and occupiers of land, attractive nuisance, **1109**

NURSING HOME

- Malpractice and breach of fiduciary duty, **1504**

OBEDIENCE

- Negligence, right to assume others will obey laws, **602**

OBSERVATIONS

- Introductory instructions, personal experiences and observations, **104**

OCCUPIERS OF LAND

- Owners and Occupiers of Land, this index

OFFER AND ACCEPTANCE

- Contracts, this index
- Duration, **2408**
- Lapse of offer, **2504**
- UCC Sales Contracts, this index

OFFICIAL PROCEEDINGS

- Defamation, claim for damages based on official proceeding report, **410**

OFF-PREMISES INJURIES OR DAMAGES

- Owners and occupiers of land, **1110**

OMISSION OF MATERIAL FACT

- Deceptive trade practices, damages, **2902**

ORDINANCES

- Negligence, violation of as evidence of, generally, **601**
- Rules of the road, violation of ordinance as evidence of negligence, **903**

ORDINARY CARE

- Bank Deposits and Collections, this index
- Defined, **303, 3004**
- Duty to use, **305**
- Minors, ordinary care of, **304**
- Negligence, right to assume others will use ordinary care, **602**
- Rules of the road, **912**

ORDINARY MEANING

- Contracts, **2413**

OUTRAGE

Intentional torts, burden of proof, 401

OWNERS AND OCCUPIERS OF LAND

Generally, 1101 to 1110

Absolute liability, ultrahazardous activities, 1108

Attractive nuisance, burden of proof, 1109

Burden of proof, attractive nuisance, 1109

Damages, off-premises injuries or, 1110

Definitions, willful or wanton conduct, 1101

Distinction between trespasser or licensee and invitee, duty owed to each, 1107

Duties

Distinction between trespasser or licensee and invitee, 1107

Foreign object or substance, duty owed to admitted invitee, 1106

Invitee, below

Landlord's duty of care to repair and maintain property, 1105

Licensee, below

Off-premises injuries or damages, 1110

Trespasser, below

Eminent domain, owner's testimony of fair market value, 2009

Foreign object or substance, duty owed to admitted invitee, 1106

Invitee

Distinction between trespasser or licensee and invitee, duty owed to each, 1107

Duty owed to, generally, 1104

Foreign object or substance, duty owed to admitted invitee, 1106

OWNERS AND OCCUPIERS OF LAND—Cont'd

Landlord's duty of care to repair and maintain property, 1105

Licensee

Distinction between trespasser or licensee and invitee, duty owed to each, 1107

Duty owed to, generally, 1103

Nuisances, attractive nuisance, 1109

Off-premises injuries or damages, 1110

Trespasser

Distinction between trespasser or licensee and invitee, duty owed to each, 1107

Duty owed to, generally, 1102

Ultrahazardous activities, absolute liability, 1108

Willful or wanton conduct, definition, 1101

OWNERSHIP

Title and Ownership, this index

PAIN AND SUFFERING

Damages for past and future, 2205

PARENT AND CHILD

Children or Minors, this index

PARTNERSHIP

Generally, 710, 711

Definition, 710

Existence of relationship, tests of, 711

Tests of existence of relationship, 711

PASSENGERS

Agency, passenger in vehicle, 705, 706

Common carriers' duty to, 1701, 1702

Rules of the road; duty to use ordinary care, 912

PAST

Damages, this index

PEDESTRIANS

Rules of the road, common right
to use streets and highways,
911

PERFORMANCE OR BREACH

Contracts, this index
Course of Performance, this index

PERMANENCY

Damages, this index

PERMISSION

Consent or Approval, this index

PERSON

Franchise Practices Act, person
defined, 2803

**PERSONAL OBSERVATIONS
AND EXPERIENCES**

Introductory instructions, 104

PERSONAL PROPERTY

Damages, this index

PHYSICIANS AND SURGEONS

Malpractice and Breach of Fidu-
ciary Duty, this index

PRE-EXISTING CONDITION

Damages, aggravation of pre-
existing condition, 2203

**PREPONDERANCE OF
EVIDENCE**

Defined, 202

PREPRINTED FORMS

Contracts, written or typewritten
provisions control provisions
of preprinted forms, 2422

PRESENT VALUE

Defined, 2220

PRESUMPTIONS

Burden of Proof, this index
Negligence, no presumption of
fault from happening of
injury, 603

PREVENTION

Contracts, prevention of perfor-
mance as defense, 2441

PRICE

Eminent domain, purchase price
of property taken, 2012
UCC Sales Contracts, this index

PRINCIPAL AND AGENT

Agency, this index

PRINTED FORMS

Contracts, written or typewritten
provisions control provisions
of preprinted forms, 2422

PRIOR MATTERS

Damages, this index

PRIVACY

Invasion of Privacy, this index

PRIVATE FIGURE

Defamation, claim for damages
based on, 407, 410

PROBABLE CAUSE

Defined, 414

PROCESS

Abuse of Process, this index

PRODUCTS LIABILITY

Generally, 1001 to 1017
Burden of proof
Fitness for particular purpose,
implied warranty of, 1011
Merchantability, implied war-
ranty of, 1010
Strict liability in tort, 1008
Claims involving two or more
theories of liability, 1013
Comparative fault, evidence, 1014
Compliance with law, 1015
Defective condition defined, 1016
Defenses
Comparative fault, 1014
Unavoidably unsafe products,
1009
Definitions
Defective condition, 1016
Unreasonably dangerous, 1017
Express warranty, breach of, 1012
Fitness for particular purpose,
implied warranty of, 1011

PRODUCTS LIABILITY

—Cont'd

- Food vendor's duty, **1007**
- Implied warranty. Warranty, below
- Inspection duty of vendor, **1006**
- Manufacturers and manufacturing
 - Generally, **1001 to 1004**
 - Duty, generally, **1001**
 - Instruction duty, **1003**
 - Vendor assuming role of manufacturer, **1004**
 - Warning duty of manufacturer, **1002**
- Merchantability, implied warranty of, **1010**
- Strict liability in tort, **1008**
- Unavoidably unsafe products, defenses, **1009**
- Unreasonably dangerous defined, **1017**
- Vendors
 - Food vendor's duty, **1007**
 - Inspection duty of vendor, **1006**
 - Warning duty of vendor, **1005**
- Warning duty of vendor, **1005**
- Warranty
 - Burden of proof, above
 - Express warranty, breach of, **1012**
 - Fitness for particular purpose, implied warranty of, **1011**
 - Merchantability, implied warranty of, **1010**

PRODUCTS LIABILITY, WARNING DUTY OF VENDOR

- Electricity, warning of danger duty, **1404**

PROFITS

- Damages, past and future loss of profits, **2206**

PROMISSORY ESTOPPEL

- Contracts, **2444, 2445**

PROPERTY

- Children or minors, willful or malicious destruction by minor, **801**

PROPERTY—Cont'd

- Damage to property. Damages, this index
- Personal property. Damages, this index
- Real Property, this index

PROPERTY DAMAGE

- Damages, this index

PROSECUTION

- Malicious Prosecution, this index

PROXIMATE CAUSE

- Generally, **501 to 503**
- Burden of proof, **503**
- Concurring proximate cause, **501, 502**
- Definition, **501, 503**
- General verdict, concurring proximate cause, **502**
- Intervening proximate cause, **503**
- Liability, concurring proximate cause, **502**
- Malpractice and Breach of Fiduciary Duty, this index
- Verdict, concurring proximate cause, **502**

PUBLIC DISCLOSURE

- Invasion of privacy by public disclosure of private facts, claim for damages based upon, **422**

PUBLIC FIGURES

- Defamation, claim for damages based upon, **408, 409**

PUBLIC MEETING REPORT

- Defamation, claim for damages based on, **410**

PUBLISHED AND PUBLICATION

- Defined, **412**

PUNITIVE DAMAGES

- Generally, **2218, 2218A**

QUALIFIED PRIVILEGE

- Defamation, claim for damages based on, **410**

RAILROADS

Generally, **1801 to 1805**

Abnormally dangerous crossing,
duty to warn, **1805**

Bell, duty to sound bell for crossing, **1801**

Crossings. Grade crossing, below
Duty

Crossing, duty to sound bell or
whistle for, **1801**

Lookout, duty to keep, **1802**

Warning duty, below

Grade crossing

Abnormally dangerous crossing,
duty to warn, **1805**

Bell or whistle, duty to sound
for crossing, **1801**

Look and listen duty of motorist,
1804

Listening duty of motorist at grade
crossings, **1804**

Look and listen duty of motorist at
grade crossings, **1804**

Lookout, duty to keep, **1802**

Speed of train, **1803**

Warning duty

Abnormally dangerous crossing,
duty to warn, **1805**

Bell or whistle, duty to sound
for crossing, **1801**

Whistle, duty to sound whistle for
crossing, **1801**

REAL PROPERTY

Damages, this index

Eminent Domain, this index

Owners and Occupiers of Land,
this index

REASONABLENESS

Contracts, interpretation of reasonable
time, **2423**

REASONABLY CERTAIN

Defined, **2407**

RECESSES

Duty of jury during, **102**

REFERRALS

Malpractice, duty of referring
physician, surgeons or
dentist, **1502**

REJECTION

Acceptance or Rejection, this
index

RELATIONSHIPS

Burden of proof, relationship
admitted, **208**

Malpractice and breach of fiduciary
duty, relationship
undisputed, **1513**

RELEASE

Contracts, release as defense, **2432**

REMEDIES

UCC Sales Contracts, this index

RENEWAL

Franchise Practices Act, damages
for renewal failure, **2800**

REPAIRS

Electricity, repair duties, **1401**

Landlord's duty of care to repair
and maintain property, **1105**

Real property, damages, **2224**

REPORTS

Official proceeding report, claim
for damages based on defama-
tion, **410**

REPUDIATION

UCC sales contracts, damages for
repudiation by buyer, **2524**

RES IPSA LOQUITUR

Addition to specified acts of
negligence, **610**

Electricity, **1405**

Negligence

Generally, **609**

Addition to specified acts of
negligence, **610**

RESALE

UCC sales contracts, damages for
resale of goods, **2526**

INDEX

RESCUE

Negligence, attempted rescue, 612

RESPECTIVE DUTIES OF JUDGE AND JURY

Introductory instructions, 103

RESPONSIBILITY

Children or Minors, this index

RESTITUTION IMPLIED IN FACT

Contracts, 2445

RESTRICTIONS

Limitations or Restrictions, this
index

REVOCATION OR SUSPENSION

Statute of Limitations, this index

UCC Sales Contracts, this index

RIGHT OF WAY

Generally, 904 to 909

Acquisition, 909

Definitions, 909

Four-way stop intersections, 906

Rules of the road, generally, 904
to 909

Signal light intersection, 907

Stop intersection

Generally, 905

Four-way stop intersections,
906

Uncontrolled intersections, 904

Use, 909

Yield intersection, 908

RIGHT-ANGLE AUTOMOBILE COLLISION

Illustrative sets of instructions,
Chapter 36.1

ROUTE

Agency, deviation from route, 704

RULES OF THE ROAD

Generally, 901 to 914

Acquisition, right of way, 909

Common law rules of the road,
generally, 901

RULES OF THE ROAD—Cont'd

Control, common law rules of the
road, 901

Definitions, right of way, 909

Emergency vehicles

Duty of drivers of other
vehicles, 914

Special privileges, 913

Evidence of negligence, violation
of statute or ordinance as,
903

Forward vehicle, superior right of,
902

Four-way stop intersections, right
of way, 906

Lookout, common law rules of the
road, 901

Negligence, violation of statute or
ordinance as evidence of, 903

Ordinance, violation of as evi-
dence of negligence, 903

Ordinary care, passenger, 912

Passenger, duty to use ordinary
care, 912

Pedestrians, common right to use
streets and highways, 911

Right of Way, this index

Signal light intersection, right of
way, 907

Special privileges, emergency
vehicles, 913

Speed, common law rules of the
road, 901

Statute, violation of statute as evi-
dence of negligence, 903

Stop intersection. Right of Way,
this index

Superior right of forward vehicle,
902

Uncontrolled intersections, right
of way, 904

Unsafe vehicle, operation of, 910

Use

Pedestrians and motorists, com-
mon right to use streets
and highways, 911

Right of way, 909

Yield intersection, right of way,
908

SAFETY

Rules of the road, operation of unsafe vehicle, **910**

SAFETY APPLIANCE AND BOILER INSPECTION ACTS

Generally, **Chapter 20**

SALES

Deceptive trade practices, damages, **2902**

Dram Shop Liability, this index

Eminent domain, sales of comparable properties, **2011**

Franchise Practices Act, this index

Implied warranties of habitability, sound workmanship, and proper construction in sale of house. Construction Work, this index

Intoxicating liquors. Dram Shop Liability, this index

UCC Sales Contracts, this index

SALVAGE

Damages, no salvage, **2228**

SANITARIUM, DUTY OF

Malpractice and breach of fiduciary duty, **1504**

SCARS

Damages, results of injury, **2208**

SCOPE OF AUTHORITY

Employment, **702**

SCOPE OF EMPLOYMENT

Employment, **702, 703**

SECLUSION

Invasion of privacy by intrusion upon seclusion, claim for damages based upon, **420**

SECURITIES

Fraud and deceit. Securities Fraud, this index

SECURITIES FRAUD

Generally, **2700 to 2706**

Damages

Generally, **2700, 2701**

SECURITIES FRAUD—Cont'd

Damages—Cont'd

Measure of damages, **2706**

Defenses, **2702**

Definitions, **2703**

Imputed liability, **2704, 2705**

Measure of damages, **2706**

SEPARATE RIGHTS

Introductory instructions, separate rights of two or more, **109, 110**

SICKNESS OR ILLNESS

Contagious diseases, duty to prevent spread of, **1505**

Contracts, disabling illness as defense, **2440**

SIGNAL LIGHTS

Rules of the road, right of way, **907**

SIGNATURE

Bank deposits and collections, negligence contributing to forged signature, **3006**

Children or Minors, this index

SPECIAL PRIVILEGES

Emergency vehicles, rules of the road, **913**

SPECIFICITY

Contracts, interpretation of specific and general provisions, **2421**

SPEED

Railroads, speed of train, **1803**

Rules of the road, **901**

STANDARD OF CARE

Burden of proof, varying standards of care, **205**

Construction work, **1203, 1204**

STATUTE OF LIMITATIONS

Duration of suspension of running of, **212**

Fraudulent concealment to suspend running of, **211**

INDEX

STATUTES

Automobiles. Children or Minors, this index

Children or Minors, this index

Liability, generally, 801 to 804

Limitation of actions. Statute of Limitations, this index

Motor vehicles. Children or Minors, this index

Negligence, violation of statute as evidence of, 601

Rules of the road, violation of statute as evidence of negligence, 903

Willful or malicious destruction of property by minor, 801

STOP INTERSECTION

Right of Way, this index

STRICT LIABILITY IN TORT

Products liability, 1008

SUBMISSION

Interrogatories, submission of case on, 201

SUBSTANTIAL PERFORMANCE

Contracts, 2428

SUPERIOR RIGHT OF FORWARD VEHICLE

Rules of the road, 902

SUPPRESSION OF EVIDENCE

Introductory instructions, 106

SUPPRESSION OF MATERIAL FACT

Deceptive trade practices, damages, 2902

SUSPENSION

Revocation or Suspension, this index

TACIT AGREEMENT RULE

Contracts, damages, 2443

TEMPORARY MATTERS

Eminent domain, temporary construction easement, 2010

TEMPORARY MATTERS

—Cont'd

Real property, temporary damage to, 2224

TENDER

Contracts, 2428

TERMINATION

Franchise Practices Act, damages for termination, 2800

TESTS OR TESTING

Partnership, tests of existence of relationship, 711

THIRD PARTY

Contracts, third party beneficiary statute, 2410, 2411

THIRD PERSONS

Common carriers' duty to protect passengers from, 1702

TIME

Contracts, this index

Damages, this index

Future matters. Damages, this index

Past. Damages, this index

Real property, temporary damage to, 2224

TITLE AND OWNERSHIP

Agency, owner of vehicle as passenger, 705

Animals, duty of owner, 1601

Realty. Owners and Occupiers of Land, this index

UCC sales contracts, implied warranty of title, 2512

TORTS

Intentional Torts, this index

TRADE

Deceptive Trade Practices, this index

Secrets. Trade Secrets, this index

TRADE SECRETS

Generally, 2600 to 2604

Damages, misappropriation of trade secrets, 2600, 2604

TRADE SECRETS—Cont'd

- Definitions
- Misappropriation, **2601**
- Trade secret, **2602**
- Measure of damages, misappropriation of trade secrets, **2604**
- Misappropriation of trade secrets
- Damages, **2600, 2604**
- Defined, **2601**
- Measure of damages, **2604**

TRANSFER

- Franchise Practices Act, transfer defined, **2807**

TRAVELER

- Construction activity, duty of care of traveler with knowledge of, **1201**

TRESPASSER

- Owners and Occupiers of Land, this index

TYPEWRITTEN PROVISIONS

- Contracts, typewritten provisions control provisions of preprinted forms, **2422**

UCC SALES CONTRACTS

- Generally, **2501 to 2529**
- Acceptance or rejection
- Generally, **2503**
- Additional terms in acceptance or confirmation, **2505**
- Breach of warranty, accepted goods, **2520**
- Damages, below
- Goods, acceptance of, **2517**
- Rejection of goods, generally, **2516**
- Revocation of acceptance, **2518**
- Action for price, damages, **2525**
- Additional terms in acceptance or confirmation, **2505**
- Breach of UCC warranty. Warranties, below
- Confirmation, additional terms in, **2505**
- Course of dealing
- Generally, **2511**

UCC SALES CONTRACTS

—Cont'd

- Course of dealing—Cont'd
- Implied warranty from course of dealing, **2510**
- Course of performance, **2511**
- Damages
- Breach of warranty, accepted goods, **2520**
- Incidental damages, **2522, 2527**
- Market price, proof of, **2528**
- Nonacceptance by buyer, **2524**
- Nondelivery, damages for, **2519**
- Price, below
- Proof of market price, **2528**
- Rejection, damages for, **2519**
- Repudiation by buyer, **2524**
- Resale of goods, **2526**
- Revocation, damages for, **2519**
- Defense, exclusion or modification of implied warranties, **2514**
- Definitions
- Course of dealing, **2511**
- Merchant, **2506**
- Usage of trade, **2511**
- Delivery
- Damages for nondelivery, **2519**
- Improper delivery, buyer's rights on, **2515**
- Evidence of market price, damages, **2528**
- Exclusion of implied warranties as defense, **2514**
- Existence of contract, **2502**
- Express warranties, **2508**
- Fitness for particular purpose, implied warranty of, **2513**
- Formation, **2501**
- Goods, acceptance of, **2517**
- Implied warranties
- Course of dealing or usage of trade, implied warranty from, **2510**
- Defense, exclusion or modification of implied warranties, **2514**
- Fitness for particular purpose, implied warranty of, **2513**

UCC SALES CONTRACTS

—Cont'd

- Implied warranties—Cont'd
 - Infringements, implied warranty against, **2512**
 - Merchantability, implied warranty of, **2509**
 - Title, implied warranty of, **2512**
- Improper delivery, buyer's rights on, **2515**
- Incidental damages, **2522, 2527**
- Infringements, implied warranty against, **2512**
- Lapse of offer, **2504**
- Limitation of remedies for breach of warranty, **2529**
- Market price, proof of, **2528**
- Merchant defined, **2506**
- Merchantability, implied warranty of, **2509**
- Modification
 - Defense, modification of implied warranties as, **2514**
 - Remedies for breach of warranty, modification of, **2529**
- Nonacceptance by buyer, damages for, **2524**
- Nondelivery, damages for, **2519**
- Offer
 - Generally, **2503**
 - Acceptance or rejection, above
 - Lapse of offer, **2504**
- Performance, course of performance, **2511**
- Price
 - Action for price, damages, **2525**
- Damages
 - Action for price, **2525**
 - Market price, proof of, **2528**
 - Proof of market price, damages, **2528**
- Proof of market price, damages, **2528**
- Rejection. Acceptance or rejection, above
- Remedies
 - Limitation or modification of remedies for breach of

UCC SALES CONTRACTS

—Cont'd

- Remedies—Cont'd
 - warranty, **2529**
 - Seller's remedies, generally, **2523**
- Repudiation by buyer, damages for, **2524**
- Resale of goods, damages for, **2526**
- Revocation
 - Acceptance, revocation of, **2518**
 - Damages for, **2519**
- Seller's remedies, generally, **2523**
- Title, implied warranty of, **2512**
- Usage of trade
 - Generally, **2511**
 - Implied warranty from usage of trade, **2510**
- Warranties
 - Breach of UCC warranty, generally, **2507**
 - Damages for accepted goods, breach of warranty, **2520**
 - Express warranties, **2508**
 - Implied warranties, above
 - Limitation or modification of remedies for breach of warranty, **2529**

ULTRAHAZARDOUS ACTIVITIES

- Owners and occupiers of land, absolute liability, **1108**

UNAVOIDABLY UNSAFE PRODUCTS

- Defenses, products liability, **1009**

UNCONTROLLED INTERSECTIONS

- Rules of the road, right of way, **904**

UNDISPUTED RELATIONSHIP

- Definition of fiduciary duty, **1513**

UNDUE INFLUENCE

- Contracts, undue influence as defense, **2434**

**UNINSURED OR
UNDERINSURED
MOTORIST COVERAGE**

Generally, 2301 to 2303

Burden of proof, 2301 to 2303

UNJUST ENRICHMENT

Contracts, 2445

UNLAWFUL PRACTICES

Franchise Practices Act, damages
for unlawful practices of
franchisors, 2805

UNMARRIED MINOR

Damages, wrongful death, 2217

USE

Rules of the Road, this index

UCC Sales Contracts, this index

VALUE OR VALUATION

Damages, this index

Fair Market Value, this index

Present value defined, 2220

**VARYING STANDARDS OF
CARE**

Burden of proof, 205

VEHICLES

Motor Vehicles, this index

VENDORS

Products Liability, this index

VERDICT

Comparative Fault, this index

Concurring proximate cause, 502

General Verdict, this index

Principal and agent. Comparative
Fault, this index

VISIBLE RESULTS OF INJURY

Damages, 2208

WAIVER OR ESTOPPEL

Construction work, waiver of
implied warranties of habit-
ability, sound workmanship,
and proper construction, 1207

Contracts, this index

WARNING DUTY

Products liability, warning duty of
vendor, 1005

Railroads, this index

WARRANTIES

Construction Work, this index

Express Warranties, this index

Fitness for Particular Purpose, this
index

Implied Warranty, this index

Products Liability, this index

UCC Sales Contracts, this index

WASTE

Whistle-blowers, waste defined,
3104

WHISTLE

Railroad crossing, duty to sound
whistle for, 1801

WHISTLE-BLOWERS

Employment, 3101 to 3107

WHOLE

Contract language interpreted as,
2419

**WILLFUL OR WANTON
CONDUCT**

Children or minors, liability
imposed by statute for willful
destruction of property by
minor, 801

Definition, 1101

WITNESSES

Credibility of witnesses, 105

Expert witnesses, 107

WORDS AND PHRASES

Distinctions, this index

**WRITINGS OR WRITTEN
INSTRUMENTS**

Contracts, written provisions
control provisions of
preprinted forms, 2422

WRONGFUL DEATH

Damages, this index

INDEX

WRONGFUL TERMINATION

Employment, **3107**

YIELD INTERSECTION

Rules of the road, right of way,
908

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